(22,455)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 191.

WILLIAM H. DILL, PLAINTIFF IN ERROR,

vs.

WILLIAM H. EBEY, RECEIVER OF THE CITIZENS BANK AND TRUST COMPANY OF STONEWALL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1 UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the city of Guthrie this 22" —, 1910.

W. H. L. CAMPBELL,
Clerk, Supreme Court of Oklahoma.
By W. M. BONNER, *Dep.*

[Seal, Supreme Court, State of Oklahoma.]

Plaintiff's costs, $—— paid by W. H. Ebey, Receiver.
Defendant's costs, $36.60 paid by W. H. Dill.
Cost of transcript, $44.10 paid by W. H. Dill.

W. H. L. CAMPBELL, *Clerk,*
By W. M. BONNER.

2 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to William H. Ebey, Receiver of The Citizens Bank and Trust Company of Stonewall, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein William H. Dill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma, this 9 day of December, 1910.

JESSE J. DUNN,
Chief Justice, Supreme Court of Oklahoma.

Attest:
W. H. L. CAMPBELL,
Clerk, Supreme Court of Oklahoma.
By W. M. BONNER, *Dep.*

[Seal, Supreme Court, State of Oklahoma.]

3 [Endorsed:] No. —. William H. Dill, plaintiff in error, vs. William H. Ebey, receiver of The Citizens Bank and Trust Company of Stonewall, defendant in error. Writ. Received this writ this 19th day of December, 1910, and executed the same

by delivering a true copy thereof to William H. Ebey the defendant in error in person, at Ada, in the Eastern District of Oklahoma this 20th day of December, 1910. S. G. Victor, United States Marshal for the Eastern District of Oklahoma. By M. G. Norvell, Deputy. Filed Dec. 22, 1910. W. H. L. Campbell, clerk.

4 In the Supreme Court of the State of Oklahoma.

No. —.

W. H. DILL, Plaintiff in Error,
vs.
W. H. EBEY, Receiver of the Citizens Bank and Trust Company of Stonewall, Defendant in Error.

Petition for Writ of Error, Assignment and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the plaintiff in error hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said W. H. Dill assigns the following errors in the records and proceedings of the said case:

The Supreme Court of Oklahoma erred in holding and deciding that said action was not one on contract for the recovery of money in which there was an adequate remedy at law, and in denying to the plaintiff the right to trial by jury of the issues in said cause. The said right to a trial by jury of the issues in said cause was specially set up and claimed under the Seventh Amendment to the Constitution of the United States, as well as under the provisions of the statutes of the United States, the cause having been brought in the United States Court in the Indian Territory prior to the admission of the State and transferred to the State Court by operation of a Federal statute; and said right and demand for a jury trial was denied the plaintiff in error by the judgment of said Court.

5 The said errors are more particularly set forth as follows:

The Supreme Court of Oklahoma erred in holding and deciding:

First. That the cause of action set out in the petition was not an action on a contract in which a plain, adequate and complete remedy could be had at law as contemplated in Section 723, Revised Statutes, United States.

Second. That a court of equity would take cognizance of an action to recover a money judgment on contract because four different defendants were joined in the same action, their liability depending upon independent contracts to which each had a separate defense; the cause having arisen in the Indian Territory and the action having been commenced in the courts of the United States, in the Indian Territory, prior to the admission of the State of Oklahoma into the Union.

Third. That the plaintiff in error was not entitled to a jury trial upon the issues in said cause under the provisions of the Seventh Amendment to the Constitution of the United States.

Fourth. That the laws of the State of Oklahoma could deprive the plaintiff in error of the right to a jury trial in said cause, the said right having arisen under the Constitution and laws of the United States, before the laws of Oklahoma were extended over said jurisdiction.

Fifth. That a court of equity by taking jurisdiction of a cause, which cause was not of equitable cognizance, has the power thereby to deprive the plaintiff in error of the right to a trial by jury, which right is guaranteed by the Seventh Amendment to the Constitution.

For which errors the said W. H. Dill, Plaintiff in Error, prays that the said judgment of the Supreme Court of the State of Oklahoma, dated November 16" 1910, be reversed and a judgment rendered in favor of the Plaintiff in Error for costs.

6

JOHN H. BURFORD,
FRANK B. BURFORD,
JOHN DEVEREUX,
Attorneys for Plaintiff in Error W. H. Dill.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let the writ of error issue, the Plaintiff in Error W. H. Dill, having executed a bond in the sum of Four Thousand Dollars, which bond has been approved and shall act as a supersedeas.

JESSE J. DUNN,
Chief Justice, Supreme Court of Oklahoma.

Dated December 9 1910.

Attest:
W. H. L. CAMPBELL, *Clerk,*
By W. M. BONNER, *Dep.*
[SEAL.]

Endorsed on back as follows: No. 381. In the Supreme Court of the State of Oklahoma. W. H. Dill, Plaintiff in Error, vs. W. H. Ebey, Receiver of the Citizens Bank and Trust Company of Stonewall, Defendant in error. Petition for writ of error. Assignment and prayer. Burford & Burford, Att'ys for Plaintiff in error. Filed Dec 9 1910 W. H. L. Campbell, Clerk.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between W. H. Dill

and W. H. Ebey, Receiver of the Citizens Bank and Trust Company of Stonewall, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said W. H. Dill, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,

8 so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States first in precedence, Acting Chief Justice, the 9th day of December in the year of our Lord one thousand nine hundred and ten.

HARRY L. FINLEY,
Clerk, Circuit Court United States,
Western District of Oklahoma.

Allowed: Dec 9th, 1910.

JESSE J. DUNN,
Chief Justice, Supreme Court of Oklahoma.

[The seal of the Circuit Court of The United States, Western District of Oklahoma.]

Filed Dec. 14, 1910.

W. H. L. CAMPBELL, *Clerk.*

9 In the Supreme Court of the State of Oklahoma.

W. H. DILL, Plaintiff in Error,
vs.
W. H. EBEY, Receiver of the Citizens Bank and Trust Company of Stonewall, Defendant in Error.

Supersedeas Bond.

Know all men by these presents: That we, W. H. Dill as principal and M. B. Flesher, and H. L. Graves, as sureties are held and firmly bound unto W. H. Ebey, Receiver of the Citizens Bank and Trust Company of Stonewall, in the sum of Four Thousand Dollars, to be paid to the said W. H. Ebey, Receiver, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 28" day of November, 1910.

Whereas, The above named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma;

Now therefore, The condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void. Otherwise to remain in full force and effect.

W. H. DILL,
Principal.
M. B. FLESHER,
H. L. GRAVES,
Sureties.

10 STATE OF OKLAHOMA,
County of Okfuskee, ss:

M. B. Flesher, and H. L. Graves, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Oklahoma, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Four Thousand Dollars over and above all debts, liabilities and exemptions.

M. B. FLESHER.
H. L. GRAVES.

Subscribed and sworn to before me this 28th day of November, 1910.

[SEAL.] D. REPLOGLE,
Notary Public.

My commission expires May 12", 1912.

Bond approved, and to operate as a supersedeas.
Dated: Nov. 29, 1910.

[SEAL.] JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

Endorsed on back: No. 381. In the Supreme Court of the State of Oklahoma. W. H. Dill, Plaintiff in error, vs. W. H. Ebey, Receiver of the Citizens Bank and Trust Company of Stonewall, Defendant in error. Supersedeas Bond. Filed Nov. 29 1910. W. H. L. Campbell, Clerk.

10½ SUPREME COURT,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the said court, do hereby certify that there was lodged with me as such clerk in the matter of W. H. Dill vs. W. H. Ebey, Receiver of the Citizens Bank and Trust Company of Stonewall:

1. The original bond of which a copy is herein set forth, filed Nov. 29, 1910.

2. Two copies of the writ of error, as herein set forth,—one for defendant, and one to file in my office: filed Dec. 14, 1910

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Guthrie, Oklahoma, this 22 —, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk, Supreme Court of Oklahoma.
By RENEL HASKELL, Jr.,
Dep.

11 Be it remembered, That thereafter, to-wit: On the 7th day of September, 1908, the petition in error and case made in said cause was filed in the Supreme Court, and is as follows, to-wit:

In the Supreme Court of the State of Oklahoma.

Filed Sep. 7, 1908. W. H. L. Campbell, Clerk Supreme Court.

No. 381.

W. H. DILL et al., Plaintiff in Error,
vs.
W. H. EBEY, as receiver of the Citizens Bank & Trust Company, Stonewall, Defendant in Error.

Petition in Error.

The said W. H. Dill, Plaintiff in error, alleges and says to the court that on the 25th day of March 1908, said W. H. Ebey as receiver of the Citizens Bank and Trust Company, defendant in error obtained judgment in the District Court of the State of Oklahoma within and for the County of Okfuskee, by the consideration of said Court for the sum of Two Thousand Dollars ($2,000.00) and interest thereon at the rate of six per cent (6%) and cost of suit against said W. H. Dill

plaintiff in error, in a certain action then pending in said District Court, wherein the said W. H. Dill, plaintiff in error was defendant and the said W. H. Ebey defendant in error, was plaintiff. A certified copy of said case-made, the pleadings and proceedings and said judgment in said action in said District Court is hereunto attached and made a part of this petition in error.

The said W. H. Dill, plaintiff in error, alleges that there is error in said proceedings, and judgment, and assigns error thereto as follows:—

1st. Said Court erred in overruling plaintiff in error's motion to strike from the complaint all the alleged cause of action against M. W. Krause, H. G. Maiot, J. E. Grier and Sam Ward.

Case made, pages 8-11.

2nd. Said court erred in overruling plaintiff in error's demurrer to the complaint therein.

Case made, pages 13-14.

3rd. Said court erred in overruling the motion of plaintiff in error, for a new trial.

12-14 case made, pages 35-38.

4th. Said Court erred in not rendering judgment for the plaintiff in error on pleadings and evidence.

5th. Said Court erred in not dismissing said cause for want of equity jurisdiction.

6th. Said Court erred in admitting evidence on the part of the *defence* in error.

7th. Said Court erred in his finding of facts because there is no evidence to support same.

case made, pages 50-59.

Wherefore the plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error, and against the defendant in error, upon the pleadings of the evidence introduced in said trial; that the plaintiff in error be restored to all rights that he has lost by the rendition of such judgment and for such other relief as to the Court may seem just and proper.

W. H. DILL,
Plaintiff in Error,
By C. T. HUDDLESTON,
Attorney.

Filed Sep. 7, 1908.

W. H. L. CAMPBELL,
Clerk of the Supreme Court.

15 In the District Court of Oklahoma within and for the County of Okfuskee.

W. H. EBEY, Receiver of Citizens Bank & Trust Co., Plaintiff,
vs.
M. W. KRAUSE, W. H. DILL, H. G. MALOT, J. E. GUIER, SAM WARD, Defendants.

Case Made.

Be it remembered, That heretofore, to-wit, on the 17th. day of September, 1906, this plaintiff, W. H. Ebey, Receiver of the Citizens Bank & Trust Company, commenced this action against said defendants, M. W. Krause, W. H. Dill, H. G. Malot, J. E. Guier and Sam Ward, by filing in the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Okmulgee, his complaint, which is in words and figures as follows, to-wit:

Filed September 17th, 1906, R. P. Harrison, Clerk U. S. Courts, Western Judicial District, Okmulgee, Indian Territory.

16 In the United States Court for the Western District of the Indian Territory, Sitting at Okmulgee.

W. H. EBEY, Receiver of Citizens Bank & Trust Company, Plaintiff,
vs.
M. W. KRAUSE, W. H. DILL, H. G. MALOT, J. E. GUIER, SAM WARD, Defendants.

Complaint in Equity.

Comes now the said plaintiff and represents that he is the duly appointed, qualified receiver of the Citizens Bank & Trust Company of Stonewall, Indian Territory, a corporation organized under the laws of the Indian Territory, and engaged in business at Stonewall prior to the time of the appointment of the plaintiff as its receiver, and that the defendants W. H. Dill and H. G. Malot are Citizens of the Western District of the Indian Territory and reside nearer to Okmulgee than any other place of holding court in said District and for cause of action the plaintiff avers:

1st. That heretofore to-wit, on or about the 14th, day of March 1905, the said defendants M. W. Krause, J. E. Guier, W. H. Dill and Sam Ward as corporators, organized the Citizens Bank & Trust Company for the purpose of transacting a general Banking & Trust Business at Stonewall in the Indian Territory: that M. W. Krause was elected President, and W. H. Dill was elected Vice-President, J. E. Guier was elected cashier of said corporation; that said officers together with Sam Ward constituted the first Board of Directors of said Citizens Bank & Trust Company, and the Articles of incorporation and certificate required by law were filed with the Clerk

17 of the United States Court of Appeal for the Indian Territory at South McAlester, on the 13th day of February, 1905; that

the objects and purposes of said corporation were set out in detail in the certificate filed as aforesaid, and said certificate also recites that the capital stock of said Citizens Bank & Trust Company is and was twenty-five thousand dollars ($25000.00) divided into shares of twenty-five dollars each, and that ten thousand dollars of said capital stock had been actually paid in by the subscribers and that the names of the stockholders and the number of shares subscribed for by them are as follows:

M. W. Krause, President, One Hundred twenty (120) shares W. H. Dill eighty (80) shares, J. E. Guier One hundred sixty (160) shares, and Sam Ward Forty (40) shares; that on the said 14th, day of March, 1905, as the plaintiff is advised and believes, and on such information and belief, alleges the fact to be, H. G. Malot subscribed for eighty (80) shares of the capital stock of the Citizens Bank & Trust Company, taking Forty (40) shares of the One hundred sixty (160) shares subscribed for by J. E. Guier, and Forty (40) shares of the one hundred twenty (120) shares subscribed by M. W. Krause; that on the said 14th day of March, 1905, there was issued certificate number One (1) to M. W. Krause for Eighty (80) shares of the capital stock of the said Citizens Bank & Trust Company; that on the same day certificate number Three (3) for Eighty (80) shares of the capital stock of the said Citizens Bank & Trust Company was issued to W. H. Dill; that on the same day certificate number Five (5) for Eighty (80) shares of the capital stock of said Citizens Bank & Trust Company was issued to H. G. Malot; that on the same day certificate number Four (4) for One hundred and twenty (120) shares of the capital stock of the said Citizens Bank & Trust Company was issued to J. E. Guier; that on the same day certificate number Six (6) for
18 Forty (40) shares of the capital stock of said Citizens Bank & Trust Company was issued to Sam Ward; that each of the said defendants undertook and agreed to pay to the said Citizens Bank & Trust Company the par value of the respective shares of stock issued to them, namely That M. W. Krause undertook and agreed to pay the Citizens Bank & Trust Company for the one hundred twenty (120) shares of stock issued to him, the sum of three thousand ($3,000.00) dollars; that H. G. Malot undertook and agreed to pay the par value of the Eighty (80) shares of stock issued to him, to-wit, Two thousand ($2,000.00) dollars; that W. H. Dill undertook and agreed to pay said Citizens Bank & Trust Company the par value of the Eighty (80) shares of stock issued to him, to-wit, Two Thousand ($2,000.00) dollars; that Sam Ward undertook and agreed to pay said Citizens Bank & Trust Company the par value of the Forty (40) shares of stock issued to him, to-wit, One Thousand ($1,000.00) dollars; that J. E. Guier undertook and agreed to pay said Citizens Bank & Trust Company the par value of the One hundred and twenty (120) shares of stock issued to him, to-wit, Three thousand ($3,000.00) dollars; that plaintiff is advised and believes and on such information and belief, alleges the facts to be that the only one of said defendants who paid any part of the par value of said stock or anything of value for the stock subscribed

for and issued to them was the defendant M. W. Krause who paid to said Citizens Bank & Trust Company the sum of Two Thousand ($2,000.00) dollars, and that after said sum had been paid the same was later returned to said defendant; and, as plaintiff is informed and believes, and on such information and belief alleges the fact to be, the said defendants organized said Citizens Bank & Trust Company without any purpose or intent to pay for its capital stock or any part thereof, except the Two Thousand ($2,000.00) dollars paid in by the defendant, Krause, and that this sum was paid in with the distinct understanding that it should be returned after the corporation came to be a going concern, the sworn statement in
19 the certificate of incorporation that Ten Thousand ($10,000.00) dollars had been actually paid in to the contrary notwithstanding.

2nd. That the said Citizens Bank & Trust Company was and is insolvent and on the 20th day of February, 1906, on the petition of one of its creditors the plaintiff was appointed, by the United States Court for the Southern District of the Indian Territory, receiver, to take charge of all of its property and effects and to administer the same under the order of said court, for the benefit of all its creditors; that the liabilities of said Citizens Bank & Trust Company at the time the plaintiff took charge of its assets as receiver, as shown by its books, were, $15,179.02; that a great deal of the paper of said Citizens Bank & Trust Company is worthless and a very small sum can be realized from the same and the rest of its assets; that after six months' effort the plaintiff has only been able to collect on notes Sixty dollars and Fifty cents ($60.50) and to realize on other property the sum of One Hundred ($100.00) dollars; that all of the capital stock of said Citizens Bank & Trust Company represented as paid namely, Ten thousand (10,000.00) dollars, and the assets in the hands of the plaintiff, as receiver, will not be sufficient to pay to the creditors of said Citizens Bank & Trust Company.

3rd. That on a partial presentation of the foregoing facts to Judge J. T. Dickerson, an order was made on the 15th day of August, 1906 directing the plaintiff, as receiver, to retain counsel and to institute proper proceedings against the defendants as subscribers for the capital stock of the said Citizens Bank & Trust Company to recover the respective amounts remaining unpaid on said subscription, or for the stock issued to them, for the benefit of all the creditors of the Citizens Bank & Trust Company; that this suit is filed in compliance with said order; that the plaintiff has made demand on each of the said defendants for the amount due on his subscription, or for the stock of said Citizens Bank & Trust
20 Company issued to him; that they have each failed, neglected and refused to pay the same or any part thereof; that there is now due the plaintiff as receiver of the Citizens Bank & Trust Company as unpaid subscriptions for capital stock issued to them, namely, M. W. Krause, Three thousand ($3,000.00) Dollars, W. H. Dill Two Thousand ($2,000.00) dollars H. G. Malot Two Thousand ($2,000.00) dollars, Sam Ward One Thousand ($1,000.00)

Dollars, J. E. Guier, Three thousand ($3,000.00) dollars together with interest thereof from the 14th day of March, 1905.

4th. That the plaintiff has no adequate remedy at law and unless this Court takes jurisdiction of this suit in Equity, he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions.

Wherefore the plaintiff prays the decree of this Court in his favor as receiver, against M. W. Krause for Three thousand ($3,000.00) dollars and interest, against H. G. Malot for Two thousand ($2,000.00) dollars and interest, against Sam Ward for One Thousand ($1,000.00) dollars and interest and against J. E. Guier for Three thousand ($3,000.00) dollars and interest, and for such other and further relief, as to the Court may seem just and proper.

W. H. EBEY,
Receiver Citizens Bank & Trust Company,
By GALBRAITH & McKEOWN,
His Attorneys.

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

W. H. Ebey, of lawful age first being duly sworn says; that he is the duly appointed receiver of the Citizens Bank & Trust Company of Stonewall, Indian Territory; that he has read the complaint in the above styled action and is acquainted with the facts and statements therein set forth and that the same are true, except those alleged on information and belief and those he believes to
21 be true.

W. H. EBEY.

Subscribed and sworn to before me this the 14th day of September 1906.

W. D. HAYS,
Notary Public.

My commission expires September 12th, 1908.

On the back of said complaint omitting the title of said cause, appears the following endorsement.

Western District Indian Territory filed September 17th, 1906, R. P. Harrison, Clerk of the United States Court."

That thereafter, and on the 17th day of July 1907, the defendant W. H. Dill filed in said court his motion to strike certain causes of action set out in plaintiff's complaint, which said motion is in words and figures as follows, to-wit:

22 In the United States Court for the Western Judicial District of the Indian Territory, Sitting at Okmulgee, 1907.

W. H. EBEY, Receiver of the Citizens Bank & Trust Company, Plaintiff,

vs.

M. W. KRAUSE, W. H. DILL, H. G. MALOT, J. E. GUIER, and SAM WARD, Defendants.

Motion to Strike from Complaint all the Alleged Causes of Action Against Defendant, W. H. Dill.

Comes now the defendant W. H. Dill, by his attorney C. T. Huddleston, and moves the court to strike from the complaint in this cause of action all that part of this complaint beginning on the seventh line of page One (1) which reads as follows: "H. G. Malot; Defendant, W. H. Dill, also moves to strike that part of the said complaint beginning on the tenth line of page Two (2) which reads as follows: M. W. Krause, President, One hundred and twenty (120) shares; J. E. Guier One hundred and sixty (160) shares, and Sam Ward Forty (40) shares; that on the said 14th day of March, 1905, as the plaintiff is informed and believes, and on such information and belief, alleges the fact to be, H. G. Malot subscribed for Eighty (80) shares of the capital stock of the Citizens Bank & Trust Company, taking Forty (40) shares of the One hundred sixty (160) shares subscribed for by J. E. Guier, and Forty (40) shares of the One Hundred twenty (120) — for by M. W. Krause; that on the said 14th day of March 1905, there was issued certificate number One (1) to M. W. Krause, for Eighty (80) shares of the capital stock of the Citizens Bank & Trust Company; that on the same day certificate number Five (5) for Eighty (80) shares of the capital stock of the said Citizens Bank & Trust Company was issued to H. G. Malot; that on the same day certificate number Four (4) for one hundred and twenty (120) shares of the capital stock
23 of the said Citizens Bank & Trust Company was issued to J. E. Guier; that on the same day certificate number six (6) for Forty (40) shares of the capital stock of said Citizens Bank & Trust Company was issued to Sam Ward; that each of the said defendants undertook and agreed to pay to the Citizens Bank & Trust Company the par value of the respective shares of stock issued to them, namely: That: M. W. Krause undertook and agreed to pay the Citizens Bank & Trust Company for the One hundred twenty (120) shares of stock issued to him, the sum of Three thousand ($3,000.00) dollars That; H. G. Malot undertook and agreed to pay the par value of the Eighty (80) shares of stock issued to him, to-wit, Two thousand ($2,000.00) dollars; that Sam Ward undertook and agreed to pay said Citizens Bank & Trust Company the par value of the Forty (40) shares of stock issued to him, to-wit, One thousand ($1,000.00) dollars; That J. E. Guier undertook and agreed to pay said Citizens Bank & Trust Company the par value of the One hun-

dred twenty (120) shares of stock issued to him, to-wit, Three thousand ($3,000.00) dollars; that plaintiff is advised and believes, and on such information and belief alleges the fact to be that the only one of said defendants who paid any part of the par value of said stock or anything of value for the stock subscribed for and issued to them was the defendant, M. W. Krause, who paid to said Citizens Bank & Trust Company the sum of Two thousand ($2,000.00) dollars, and that after said sum had been paid, the same was later returned to said defendant; that as plaintiff is informed and believes, and on such information and belief alleges the fact to be, the said defendants organized said Citizens Bank & Trust Company without any purpose or intent to pay for its capital stock or any part thereof, except the Two thousand ($2,000.00) dollars paid in by the defendant, Krause, and that this sum was paid in with the distinct understanding that it should be returned after the corporation came to be a going concern, the sworn statement in the certificate of
24 incorporation that Ten Thousand dollars had actually been paid in to the contrary notwithstanding.

Defendant, W. H. Dill, further moves to strike out that part of paragraph Three (3) which reads as follows: that there is now due plaintiff as receiver of the Citizens Bank & Trust Company as unpaid subscription for the capital stock issued to them, namely M. W. Krause, Three thousand ($3,000.00) dollars, H. G. Malot, Two thousand ($2,000.00) dollars, Sam Ward One thousand ($1,000.00) dollars and J. E. Guier Three thousand ($3,000.00) dollars.

Defendant Dill moves to strike out all the foregoing causes of action set forth in this motion for the reason that each cause of action, is a separate and distinct cause of action, and that none of the said causes of action affect the defendant, W. H. Dill, and for further reason that none of the foregoing causes of action affect all the parties to the said action, and is, therefore, a misjoinder of causes of actions.

Defendant W. H. Dill also moves to strike out that part of paragraph Four (4) which reads as follows: That plaintiff has no adequate remedy at law, and unless this Court takes jurisdiction of this suit in equity, he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions, for the reason the foregoing paragraph states only legal conclusions, and for the further reason this Court has no jurisdiction in equity to hear and determine this cause, the case being clearly a law case.

Defendant, W. H. Dill, also moves to strike out that part of complaint set out in the prayer of the plaintiff which reads as follows: against M. W. Krause for Three thousand ($3,000.00) dollars and interest, against H. G. Malot, for Two thousand ($2,000.00) dollars and interest, against Sam Ward for One thousand ($1,-
25 000.00) — and interest and against J. E. Guier for Three thousand ($3,000.00) dollars and interest.

Wherefore, defendant, W. H. Dill, prays that the cause of action set forth in the complaint in this action against M. W. Krause Sam

Ward, H. G. Malot and J. E. Guier be stricken from this complaint as improperly joined with the cause of action alleged against the defendant, W. H. Dill, and for his cost in this cause expended, and for a dismissal of this complaint for want of equity.

C. T. HUDDLESTON,
Att'y for W. H. Dill.

On the back of said motion, omitting the title of said cause, appears the following endorsement:

Western District Indian Territory. Filed July 17th, 1907. R. P. Harrison, Clerk of the United States Court."

That thereafter, and on the 4th day of November 1907, said motion came on for hearing before the United States Court sitting at Okmulgee, Indian Territory, and the court then and there overruled said motion to which the defendant, W. H. Dill, then and there duly excepted.

That thereafter, and on the 4th day of November 1907, the defendant, W. H. Dill, filed in said court his demurrer to the complaint of plaintiff, which said demurrer is in words and figures as follows:

26 In the United States Court for the Western Judicial District of the Indian Territory, Sitting at Okmulgee, 1907.

W. H. EBEY, Receiver of the Citizens Bank & Trust Company,
Plaintiff,
vs.
M. W. KRAUSE, W. H. DILL, H. G. MALOT, J. E. GUIER, and SAM WARD, Defendants.

Demurrer.

Comes now the defendant, W. H. Dill, and Demurres to the plaintiff's complaint and for grounds says, that said complaint does not state any sufficient facts to authorize a court of equity to assume jurisdiction; that said complaint shows upon its face that the plaintiff has a plain, adequate and complete remedy at law.

And for further reason this defendant is entitled to a trial by a jury under the laws and constitution of the United States of which this defendant would be deprived should this cause be tried in equity.

And for the further reason this Court has no jurisdiction in equity to hear and determine the said cause.

Wherefore defendant prays that the complaint be dismissed for want of equity.

C. T. HUDDLESTON,
Attorney for Defendant, W. H. Dill.

27 On the back of said demurrer, omitting the style of said cause, appears the following endorsement:
Western District, Indian Territory, Filed November 4th, 1907. R. P. Harrison, Clerk of United States Courts.

That thereafter, on the 5th day of November 1907, the said demurrer to the complaint of plaintiff was taken by the Court and the same was overruled, to which the defendant, W. H. Dill then and there duly excepted.

28 That thereafter and on the 6th day of December 1907, on the application of defendant, W. H. Dill, this case was duly transferred from the District Court for Okmulgee County to the District Court of Okfuskee County in the State of Oklahoma, and the defendant, W. H. Dill, given thirty (30) days in which to file his answer therein said cause, and that thereafter, and on the 16th day of December 1907, the said cause was duly filed in the office of the District Court for Okfuskee County, Oklahoma.

That thereafter, and on the 17th day of December 1907, the defendant W. H. Dill, filed his answer to the said Court to the said complaint, which answer is in words and figures as follows:

29 In the District Court for Okfuskee County, State of Oklahoma.

W. H. EBEY, as Receiver of the Citizens Bank & Trust Company, Plaintiff,
vs.
M. W. KRAUSE, W. H. DILL, H. G. MALOT, J. E. GUIER, and SAM WARD, Defendants.

Answer.

Comes now the defendant, W. H. Dill, and states to the Court for his answer to the plaintiff's complaint:
That he admits that M. W. Krause, W. H. Dill, J. E. Guier and Sam Ward as corporators organized the Citizens Bank & Trust Company of Stonewall, Indian Territory, for the purpose of doing a general banking business at said place.
That M. W. Krause was elected President, and W. H. Dill as Vice-President and J. E. Guier as cashier of said bank;
That said W. H. Dill subscribed for Eighty (80) shares of the capital stock of the said Citizens Bank & Trust Company on the 14th day of March or sooner, which this plaintiff is not now sure as to the dates.
That at the time the said W. H. Dill purchased the said Eighty (80) shares of capital stock from the said Citizens Bank & Trust Company, he paid the consideration therefor to the said Citizens Bank & Trust Company.
Defendant, W. H. Dill, denies that he has failed and refused to pay the sum of Two thousand ($2,000.00) dollars subscribed for

the capital stock of the said Citizens Bank & Trust Company, but alleges the truth to be that he has paid to the Citizens Bank & Trust Company every dollar that he agreed to pay the said Bank for the said stock issued to him.

Defendant W. H. Dill, denies that he is indebted to the said plaintiff in any sum due upon the said stock.

30 Wherefore, he prays that he may be dismissed from this action, and for his cost in this case and for such further and other relief as the Court may deem just and proper.

C. T. HUDDLESTON,
Att'y for Plaintiff.

W. H. Dill being duly sworn upon his oath states that he has read the statements set forth in the foregoing answer, and that the same are true as he verily believes.

W. H. DILL.

Subscribed and sworn to before me this the 17th day of December 1907.

JOHN JONES,
Notary Public.

My commission expires June 22nd 1912.

31 On the back of the said answer, omitting the style of said cause, is endorsed the following:

Filed this the 17th day of December 1907, C. E. Guthrie, Clerk.

That thereafter, and on the 17th day of December 1907, the same being one of the regular judicial days of the December term, 1907, of the District Court for Okfuskee County, Oklahoma this cause came for trial upon its merits, the plaintiff appearing in person and by his attorneys, Galbraith & McKeown, & W. W. Witten, and the defendant, W. H. Dill, appearing in person and by his attorney C. T. Huddleston, and the defendant, H. G. Malot, appearing in person and by his attorney, J. G. Potter.

That thereupon said plaintiff and defendants produced and examined the following witnesses in the following order, who testified as follows, to-wit:

32 W. H. EBEY, a witness called in his own behalf, having been first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth testified as follows:

Examined by W. W. WITTEN:

Witness stated that he was appointed receiver of the Citizens Bank & Trust Company of Stonewall, Indian Territory, that he took charge of the assets of said bank and found a safe, furniture and fixtures, which he sold for $350.00 and found a lot of worthless notes from which he collected $60.00; that the liabilities of the Bank were $6525.00 exclusive of capital stock, and that he had filed a report in the United States Court at Ada, Indian Territory.

He further testifies that he took charge of the books of the Stonewall Bank and has them in Court and identifies the Stock book.

Thereafter Witness Ebey was passed to be examined later.

And thereupon the plaintiff offered in evidence a certified copy of a judgment obtained by the Union National Bank of Kansas City, against the Citizens Bank & Trust Company of Stonewall, Indian Territory, which is in words and figures as follows, to-wit:

33 No. 708.

Vacation Order, Tuesday, February 20th, 1906.

THE UNION NATIONAL BANK OF KANSAS CITY, MISSOURI,
vs.
CITIZENS BANK & TRUST COMPANY OF STONEWALL, INDIAN TERRITORY.

Order Appointing a Receiver.

Now on this 19th. day of February, come on to be heard, the application of the plaintiff for the appointment of a Receiver; and it appearing to the Court that due notice of the application had been duly served upon the defendant, and it appearing to the court from the petition and affidavits, that said defendant Company is insolvent and unable to pay its debts:

It is therefore ordered that W. H. Ebey, of Ada, Indian Territory, be and hereby is appointed receiver of all the Property and effects of the defendant Company and is authorized and empowered to take charge of the lands, tenements, goods, chattels, assets, moneys, credits, chose in action, rights and interest of every kind, name and nature, either in law or in equity or any part thereof belonging to said corporation, and that he hold the same as provided by the laws in force in the Indian Territory and until the further order of this court.

It is further ordered that said receiver qualify by taking the oath required by law, and executing a bond in the sum of Three thousand ($3,000.00) dollars with good and sufficient sureties, said bond to be approved by the United States Clerk of the Court at Ada, Indian Territory, and the same to be in the form required by law.

(Signed) J. T. DICKERSON, *Judge.*

34 Done in Chambers at Pauls Valley, I. T. this 19th. day of February, 1906.

THE STATE OF OKLAHOMA,
County of Pontotoc:

I, W. T. Cox, Clerk of the District Court of County and State aforesaid successor of the United States Clerk for the Southern District of the Indian Territory, sitting at Ada, do hereby certify that

the above is a true and correct copy of the order appointing a receiver in above styled and number cause as the same appears of record in my office in Book "C" page 85.

Given under my hand and seal of office at Ada, Oklahoma this 16th. day of December 1907.

W. T. COX,
Clerk District Court Pontotoc County, Oklahoma.

Endorsed on back as follows: Filed 2/20.06, C. M. Campbell, Clerk.

35 And thereupon M. B. TIMBERLAKE was called as a witness in behalf of the plaintiff, who, after being first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

States that he is a Banker and has been for five years; has examined the books of the Citizens Bank & Trust Company of Stonewall, Indian Territory; states that the bank books show the Bank began business February 1st, 1905 with a capital stock of Ten thousand ($10,000.00) dollars; that the bank books show that Ten thousand ($10,000.00) dollars was to the credit of the Citizens Bank & Trust Company of Stonewall in the Citizens Bank & Trust Co., of Okemah; states that the books show there are several and various credits to the Citizens Bank & Trust Company of Okemah.

That on the date of opening the Bank at Stonewall the books show Krause paid into the Citizens Bank & Trust Company of Okemah, Two thousand ($2,000.00) dollars on capital stock for the credit of the Stonewall bank, but does not show as to Forty additional shares which he subscribed for.

The books show that on the opening date, W. H. Dill owned Two thousand ($2,000.00) dollars of the capital stock and that the said Two thousand ($2,000.00) dollars was debited to the Citizens Bank & Trust Company of Okemah; that the books of the Stonewall bank does not show that any particular one of the Two thousand ($2,000.00) dollars was transferred from the Citizens Bank & Trust Company of Okemah to the Citizens Bank & Trust Company of Stonewall, and that the same is true regarding the entry as to Guiers One hundred and twenty (120) shares.

That the books do not show Malot subscribed for any of the capital stock of the Citizens Bank & Trust Company of Stonewall.

The books of the Stonewall Bank shows Ten Thousand ($10,000.-00) — was in the Citizens Bank & Trust Company of Okemah for the use of the Stonewall Bank & Trust Company at the opening of the Stonewall Bank. Witness was asked to state if Ten thou-

36 sand ($10,000.00) — was transferred from the Citizens Bank & Trust Company of Okemah to the Citizens Bank & Trust Company of Stonewall by draft, and he stated that these entries and credits to the Citizens Bank & Trust Company of Okemah were shown among which were the following credits to the Okemah Bank: Draft $406.25; Draft $586.50; Draft $237.48 Draft for $15.00; and a debit of $407.00 also a credit of $200.00 $210.00, $46.07, and also

a debit to the Citizens Bank & Trust Company of Okemah, $538.60, and a credit to the Citizens Bank & Trust Company of Okemah for Draft $700.00.

On March 20th. a remittance by the Stonewall Bank to the Citizens Bank & Trust Company of Okemah for $538.60.

Witness states that the Citizens Bank & Trust Company of Stonewall Draft Register shows draft to the amount of $3654.00 were drawn on the Citizens Bank & Trust Company of Okemah, and that between the same dates there were deposited and sent to the Citizens Bank & Trust Company by the Stonewall Bank the amount of $2113.38 and the books of the Citizens Bank & Trust Company of Stonewall shows that the Citizens Bank & Trust Company of Okemah was indebted to the Citizens Bank & Trust Company of Stonewall in the sum of $89.91.

Witness was asked to state where the balance of the Ten thousand ($10,000.00) dollars went and stated that the small books of the Citizens Bank & Trust Company shows that checks were drawn on the Citizens Bank & Trust Company of Okemah that were not on the Draft Register.

Witness says that the signature of Malot on Malot's answer was the same as the signature on the stock book, and that the signature on the stock book of M. W. Krause was the same as the signature on the answer of M. W. Krause.

Witness states that the entry of May 4th. upon the books of the Citizens Bank & Trust Company of Stonewall relative to Malot note of Two thousand ($2,000.00) dollars and there being on the same day a credit to the Citizens Bank & Trust Company of Oke-
37 mah indicates a loan of Two thousand (2,000.00) dollars to Malot, but states in this connection that the draft Register of the Stonewall Bank does not show a draft for $5000.00, but later on does show a draft in favor of Krause for $1040.00 on the Union National Bank of Kansas City, but cannot tell if this draft was issued for money or what, and that is as far as any of the Stonewall books show, there was not any consideration paid for this draft.

The consideration for the Malot note was paid by debit to Bills Receivable for a check of $1060.00 which was paid in cash by the Stonewall Bank & Trust Company to Krause; that the entire liability shown by the books of the Citizens Bank & Trust Company are $15,232.25.

Witness Timberlake was asked on cross-examination if he did not say that the books of the Citizens Bank & Trust Company of Stonewall showed there was a charge of Two thousand ($2,000.00) dollars against W. H. Dill for which he owned stock and was charged as a remittance and was paid into the Citizens Bank & Trust Company of Okemah by Dill March 14th, 1905, to which question witness answered, "Yes."

Witness was further asked how and by what methods would funds be drawn from the Citizens Bank & Trust Company of Okemah, to the Citizens Bank & Trust Company of Stonewall to which he answered "By wire, phone, letter and advice".

Witness was then asked if all the funds in the Citizens Bank &

Trust Company of Okemah could be transferred from the Citizens Bank & Trust Company of Okemah to the Citizens Bank & Trust Company of Stonewall by letter, wire, phone and advice, or any of them, and would be proper. To which question the witness answered "Yes."

Whereupon, W. H. Ebey being called for a continuation of direct examination stated he did not find any notes or note of Malot, Krause, and that the assets of the Bank was notes, unsecured, worthless and seventy-five acres of timber land worth $250.00 to $400.00; that he found no note or entry of Malot owing the Stonewall
38 Bank except an entry in the Bills Receivable showing Malot note $200.00 and an entry in the margin that the same was paid.

Whereupon plaintiff called W. E. Little to testify in behalf of the plaintiff and having been first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

That he is acquainted with Malot and the Stonewall Bank and was a depositor; that he lost some money in the failure; done business with the Bank because he thought it was solid; talked with Malot in the Bank building, but outside the railing and Malot never said he was interested in the Bank, and did not solicit any business for the Bank.

And thereupon plaintiff offered in evidence a certified copy of the report of the Receiver, W. H. Ebey, to which the defendant W. H. Dill objected, objection overruled, defendant duly excepted, which report is in words and figures as follows:

39 In the United States Court for the Southern District of the Indian Territory, Sitting at Ada.

UNION NATIONAL BANK, KANSAS CITY, MO.,
vs.
CITIZENS BANK & TRUST COMPANY OF STONEWALL, I. T.

Report of Receiver.

To Honorable J. T. Dickerson, Judge of said Court:

Now comes W. H. Ebey, Receiver in the above cause and submits the following report:

That there came into his hands, assets as follows:

One Hall safe, Banking Furniture, Fixtures which was disposed of as follows:

Assets.

Counter sold Bank at Tupelo	$100.00
Safe etc., sold Farmers and Merchants Bank	250.00
Note of J. W. Ragland, collected	52.50
Note of W. L. Leach, collected	8.00
	$410.50

Other sound assets, 75 acres timber land (estimated value)	$375.00
Furniture sold W. E. Little but not paid for	30.00
Questionable and worthless assets are notes of E. G. Storm	505.00
Notes of T. A. Killingsworth	500.00
" " J. E. Guier	3976.00
" " Mack Burris	21.00
" " Davis Cubery	2.75
" " Clarence Brown	62.00

A disputed interest in the Stonewall Realty Company and a land lease.

40 *Recapitulation.*

Of Cash Items.

Cash received		$10.50
Cash paid out, Court costs	$8.00	
Cash paid out, Fire Insurance	11.20	
Total amount paid out		19.20
Cash on hand		$391.30

Liabilities.

I find the liabilities approximated exclusive of $10,000.00 Capital Stock, $6,525.26 of which sum there is an offset of some $850.19 leaving a Net liability of (estimated) $5,675.07. This includes the judgment obtained by the Union National Bank of Kansas City, Missouri, against the Citizens Bank & Trust Company.

Respectfully submitted,

(Signed) W. H. EBEY, *Receiver.*

Subscribed and sworn to before me, W. D. Hayes, a Notary Public within and for the Southern District of the Indian Territory on this the 18th. day of October 1906.

[SEAL.] W. D. HAYES, *Notary Public.*

Certificate.

THE STATE OF OKLAHOMA,
County of Pontotoc:

I, W. T. Cox, Clerk of the District Court of the County and State aforesaid successor of the United States Clerk for the Southern District of the Indian Territory, sitting at Ada, do hereby certify that the foregoing instrument of writing is a true and correct copy of the report of the receiver in the cause of the Union National Bank of Kansas City, Missouri, vs. Citizens Bank & Trust Company
41 of Stonewall, I. T., No. 708 as the same appears on file in my office.

Given under my hand and seal of office at Ada this the 16th. day of December 1907.

W. T. COX,
Clerk of the District Court, Pontotoc County, Oklahoma.

Endorsed on the back as follows: "Filed in open Court October 18th. 1906.

C. M. CAMPBELL, *Clerk.*
By —— ——, *Deputy.*

42 And thereupon the plaintiff introduced in evidence the first and second pages of the day book or blotter of the Citizens Bank & Trust Company of Stonewall. Page One (1) is in words and figures as follows:

February, 1905.

Cash on hand	$1.00
2/24 Citz. Bk. & T. Co., Okemah, D	406.25
" " " " " D Cks. Up to 2/15	508.40
" " " " " " " " 3/18	327.78
Citizens Bank & Trust Co., Okemah D & Cks	15.00
Capital Stock,	10,000.00
Deposit	100.00
	11,430.43

Page Two (2) is in words and figures as follows:—

Furniture & Fixtures			$923.18
2/24 Citz. B. & T. Co., Okemah,		Krause R	2000.00
3/14 "	"	Dill R	2000.00
3/14 "	"	Guier R	5000.00
20 "	"	R	1000.00
2/25 or later	"	R	407.25
3/18 Expenses			78.00
Checks			10.00
Cash			12.00
			11430.43

Whereupon the plaintiff rested.

43 And thereupon the defendants introduced the following evidence.

M. B. Flesher, a Witness called on the part of the defendants having been first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

That he had been in the banking business for six years and was the Cashier of the Citizens Bank & Trust Company of Okemah.

Counsel for defendant, W. H. Dill, hands witness a check of W. H. Dill's payable to the Citizens Bank & Trust Company of Stonewall and witness identifies the check and states that the check was

paid by the Citizens Bank & Trust Company of Okemah, March 13th, 1905 and charged to the account of W. H. Dill in the Citizens Bank & Trust Company of Okemah, and that the Citizens Bank & Trust Company of Stonewall received credit in the Citizens Bank & Trust Company of Okemah for the amount of the check, which was Two thousand ($2,000.00- dollars.

Thereupon defendant, W. H. Dill, offered said check in evidence as W. H. Dill's exhibit "A", which is in words and figures as follows, to-wit:

OKEMAH, I. T., 3/13/05.

Citizens Bank & Trust Company.

Pay to Ctz. Bk. & Tr. Co., Stonewall or bearer,.....$2000.00
Two Thousand ..... Dollars.

W. H. DILL.

Upon the face of said check is stamped the following:
"Paid by Citizens Bank & Trust Company of Okemah, I. T., March 13th, 1905."

Whereupon counsel for defendant, W. H. Dill, hands witness defendant Dill's exhibit "B", and witness identifies the same as a deposit slip given by the Citizens Bank & Trust Company of Okemah showing a credit to the Citizens Bank & Trust Company of
44 Stonewall of one item amounting to two thousand ($2,000.-00) dollars and stated that the same represented the amount paid by Dill's check of Two thousand ($2,000.00) dollars marked exhibit "A".

Witness states that the Bank books of the Citizens Bank & Trust Company of Okemah show that on the 13th of March 1905 a charge of Two thousand ($2,000.00) dollars was made against the account of W. H. Dill.

Witness further states that the item of Two thousand ($2,000.00) dollars as shown on the second page of the Citizens Bank & Trust Company of Stonewall, dated March 14th, 1905 shows that the Citizens Bank & Trust Company of Okemah was charged with the amount of Two thousand ($2,000.00) dollars and the Citizens Bank & Trust Company of Stonewall was credited to the same amount and was handled by advice carried from Okemah to Stonewall and that the ordinary time in which advice cards mailed from the Citizens Bank & Trust Company of Okemah on the 13th. of March, 1905 to reach the Citizens Bank & Trust Company of Stonewall would be about one day and would show about one day later on the Stonewall Bank Books than on the Bank Books of the Citizens Bank & Trust Company of Okemah.

That thereupon defendant, W. H. Dill, offered in evidence his exhibit "B" which is in words and figures as follows, to-wit:

"Citizens Bank & Trust Company, Deposited by Citz. Bk & Tr. Co., Stonewall, Okemah I. T. 3/13/1905. Checks as follows. Guier $5,000.00; Dill $2,000.00. Total $7,000.00

Whereupon the first and second pages of the blotter of the Stonewall Bank as heretofore introduced by the plaintiff in evidence was exhibited to witness and he stated that the capital stock on the credit side was Ten thousand ($10,000.00) dollars and on the same page a draft for $406.25; $508.40; Cash on hand $1.00 and a credit to the Citizens Bank & Trust Company of Okemah of $327.28 Drafts and check on Okemah Bank $15.00 and deposit $100.00.

Second page of the blotter on the Stonewall Bank or Debits shows Furniture and Fixtures $923.18 and on the 3/14 there was
45 paid into the Citizens Bank & Trust Company of Okemah by Dill the sum of Two thousand ($2,000.00) dollars and that the item charge of Two thousand ($2,000.00) dollars would be Dill's payment on the capital Stock.

Witness says this blotter of the Stonewall Bank shows that W. H. Dill paid Two thousand ($2,000.00) dollars on capital stock.

Witness further states that the amount charged on the first page of the Stonewall Bank blotter would indicate that the full capital stock was paid into the Citizens Bank & Trust Company of Okemah for the credit of the Citizens Bank & Trust Company of Stonewall.

Whereupon the books of the Citizens Bank & Trust Company of Okemah were handed to the witness and he stated that the books of the Citizens Bank & Trust Company of Okemah showed that the entire capital stock on the Citizens Bank & Trust Company of Stonewall had been paid into it for the credit of the Stonewall Bank.

The above and foregoing is all the evidence offered and all the evidence introduced on the trial of the above entitled cause.
46 That thereafter and on the 17th. day of December 1907, after the plaintiff and defendants had each submitted their cause upon the testimony hereinbefore set out, the cause continued and taken under advisement by the court until the March, 1908 term of the said court, and that on the 25th. day of March 1908 the Court rendered the following judgment, to-wit:

Now, on this the 25th. day of March 1908, the same being one of the regular judicial days of the March term 1908 of said Court the Court announces its decision in said cause as follows, to-wit

That after considering the evidence and the law I find for the defendant H. G. Malot and against the defendant W. H. Dill, that the plaintiff was entitled to a decree against the defendant W. H. Dill on the cause of action set out in his complaint in the sum of Two thousand ($2,000.00) dollars, together with interest thereon from March 14th. 1906 and the costs of this action incurred by him assessed at — dollars.
47 It is therefore ordered, adjudged and decreed by the court that the plaintiff take nothing by said action against the defendant H. G. Malot and that he, H. G. Malot, be and hereby is dismissed with his costs, and that the plaintiff W. H. Ebey as receiver of the Citizens Bank & Trust Company, of Stonewall, do have and recover of and from the defendant, W. H. Dill, the sum of Two thousand ($2,000.00) dollars together with interest thereon at the rate of six (6) per cent per annum from the 14th. day of March

1906 and the cost incurred by him in this action assessed at — dollars, for which let execution issue.

JOHN CARUTHERS,
Judge.

To the making and rendering of which said judgment and each and every part thereof the defendant, W. H. Dill, duly excepted at the time.

That thereafter and on the 27th. day of March 1908, and within three (3) days after the rendition of said judgment of the Court hereinbefore set out and during said March term 1908 of said District Court, said defendant, W. H. Dill, filed in said cause his motion in writing for a new trial, which said motion is in words and figures as follows, to-wit:

Filed Sep. 7, 1908.
W. H. L. CAMPBELL,
Clerk of the Supreme Court.
By —— ——, *Deputy.*

48 In the District Court of Okfuskee County, State of Oklahoma.

W. H. EBEY, Receiver of Citizens Bank & Trust Company, Plaintiff,
vs.
M. W. KRAUSE, W. H. DILL, H. G. MALOT, J. E. GUIER, and SAM WARD, Defendants.

Motion for New Trial.

Comes now the defendant W. H. Dill, and moves the court to vacate and set aside the judgment rendered in the above entitled cause and grant a new trial therein for the following reasons, to-wit:

1st. That the judgment therein is not supported by the evidence.

2nd. That the judgment is contrary to the law and the evidence.

3rd. That the judgment is not sustained by sufficient evidence and is contrary to the law.

4th. Errors of law occurring at the trial and excepted to by this defendant.

5th. Error of the Court in refusing to render judgment for the defendant, W. H. Dill, upon the pleadings.

6th. Error of the court in trying the said cause without submitting the same to a jury when the parties thereto had not waived a jury trial.

7th. Error of the court in overruling the defendant, W. H. Dill's motion to strike from the plaintiff complaint all causes of action set out in the said complaint except against this defendant.

8th. Error of Court in refusing to dismiss the plaintiff's complaint for want of Equity.

Wherefore defendant, W. H. Dill, prays for a new trial in this cause.

C. T. HUDDLESTON,
Attorney for Defendant,
W. H. Dill.

49 W. H. Dill being duly sworn upon his oath states that he has read the statements set forth in the foregoing motion and that all of said facts are true.

W. H. DILL.

Subscribed and sworn to before me this the 27th day of March 1908.

JOHN JONES,
Notary Public.

My Commission expires June 22nd, 1911.

On the back of said motion, omitting the style of said cause, appears the following endorsement:

"Filed in open court this March 27th 1908, C. E. Guthrie, Clerk of the District Court."

And thereafter to-wit: on the 30th day of March 1908, and during said March 1908, term of said Court said motion on said defendant for a new trial came on for hearing, and after the argument of counsel thereon and on the day last aforesaid, to-wit, the 30th day of March 1908, the Court being fully advised in the premises overrules said motion for a new trial, and refused to grant said defendant a new trial, to which action of the Court, in overruling said motion for a new trial, and in refusing to grant the defendant a new trial, said defendant, W. H. Dill then and there duly excepted at the time.

That thereafter and on the 30th day of March 1908, last aforesaid, the court immediately after the overruling of the motion for a new trial, and during said March 1908, Term of said Court, and for good cause shown, granted said defendant, W. H. Dill sixty (60) days from said 30th day of March 1908 in which to prepare and serve upon the plaintiff a record and case made for the Supreme Court, the plaintiff to have ten days thereafter in which to serve and suggest amendments thereto, and the same to be settled on five days' notice, by either party.

50 The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by the defendant, W. H. Dill, to such rulings and orders; exceptions by plaintiff; all the evidence offered, introduced or received upon the trial; the judgment of the court thereon, and the exceptions, if any, thereto; and the same is a true and correct statement and complete transcript of all the pleadings, motions, evidence, findings, judgments, and proceedings in said cause.

In the District Court for Okfuskee County, Oklahoma.

Filed Sep. 7. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

W. H EBEY, Receiver for the Citizens Bank & Trust Company of Stonewall, Plaintiff,

vs.

M. W. KRAUSE, W. H. DILL, H. G. MALOT, J. E. GUIER, and SAM WARD, Defendants.

To the above plaintiff and his Attorneys of Record, C. A. Galbraith & Thomas McKeown:

The above and foregoing case made is hereby tendered to and served upon you, and each of you, as a true and correct case made in the above entitled cause, and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in the above entitled cause.

C. T. HUDDLESTON,
Attorney for Defendant, W. H. Dill.

We hereby accept and acknowledge due, legal and timely service of the above and foregoing case-made on us this the 11th day of May, A. D. 1908.

GALBRAITH & McKEOWN,
Attorneys for Plaintiff.

Filed Sep. 7, 1908.

W. H. L. CAMPBELL,
Clerk of the Supreme Court,
By —— ——, *Deputy.*

51 In the District Court in and for Okfuskee County, State of Oklahoma.

W. H. EBEY, Receiver of the Citizens Bank & Trust Company, Plaintiff,

vs.

M. W. KRAUSE, W. H. DILL, H. G. MALOT, J. E. GUIER, and SAM WARD, Defendants.

Amendments Suggested by the Plaintiff.

To C. T. Huddleston, Attorney for defendant, W. H. Dill:

In the above entitled cause plaintiff suggests the following amendments to the case made as made and served by the defendant, W. H. Dill.

1st. On page Nineteen (19) after the Fifth (5) line from the bottom of said page and thereupon the plaintiff offered in evidence certified copy of the Articles of Incorporation of the Citizens Bank & Trust Company, of Stonewall, Indian Territory, which were admitted in evidence and marked plaintiff's exhibit "A" and are in words and figures as follows, to-wit:

52 UNITED STATES OF AMERICA,
Indian Territory:

Office of the Clerk of the Court of Appeals.

I, William P. Freeman, Clerk of the United — of Appeals in the Indian Territory, do hereby certify that the annexed five pages contain a true, complete and full copy of the Articles of Association and the Certificate of the Board of Directors of Citizens Bank & Trust Company of Stonewall, Indian Territory.

Endorsed: "Filed in the office of the Clerk of the United States Court of Appeals in the Indian Territory, This 13th day of February A. D. 1905, appears by comparing the same with the original roll of said Articles of Association and Certificate now on file in this office.

In Testimony Whereof, I have hereunto set my hand and affixed my seal, at the City of South McAlester, Indian Territory this 13th day of February A. D. Nineteen Hundred and Five (1905).

WM. FREEMAN,
Clerk of U. S. Court of Appeals, I. T.,
[SEAL.] By —— ——, *Deputy.*

Articles of Agreement and Incorporation of Citizens Bank & Trust Company.

Know all men by these Presents:

That the corporators hereinafter named have this day, and by these presents, formed a corporation under and in pursuance of an Act of Congress approved February 18th, 1901, entitled "An Act to put in force in the Indian Territory certain provisions of the law of Arkansas relating to Corporations and to make said provisions applicable to said Territory, which said Act provides for the incorporation for the manufacturing and other lawful business purposes in the Indian Territory, and in evidence thereof do hereby execute the following Articles of Incorporation:

First. The name of said Corporation shall be Citizens Bank & Trust Co.

53 Second. The corporation are M. W. Krause, J. E. Guier, Wm. H. Dill, and Sam Ward.

Third. The place of business is to be located at Stonewall, I. T., and its office for transaction of business shall be in Stonewall, I. T. or at such other place as the Board of Directors may select.

Fourth. The general nature of the business proposed to be transacted by this corporation is a General Bank & Trust Business.

Fifth. The amount of Capital Stock of said corporation shall be Twenty-Five thousand ($25,000.00) dollars; of which — Dollars has been subscribed by the Corporators aforesaid, and the residue thereof may be issued and disposed of as the Board of Directors may from time to time order and direct.

Sixth. The capital stock shall be divided into One Thousand (1,000) shares of the value of $25.00 each.

Seventh. The affairs and business of the Corporation shall be conducted and controlled by a board of Directors, consisting of three members, all of whom shall be stock holders of the corporation. Said board of Directors shall elect one of its members as President, and one of its members as Vice-President, and shall also elect a Secretary and Treasurer.

Eighth. The first election of directors shall be held immediately after the organization of the Corporation and said Directors shall serve for one year and until their successors are elected.

Ninth. The Board of Directors are empowered to ordain and establish all by-laws and regulations necessary to the management and business of said Corporation, and alter and repeal same at pleasure.

Tenth. The first meeting of said Corporators for organization shall be held in the Citizens Bank & Trust Company at the office of said Bank at Okemah, I. T., at 10 O'clock A. M. on the 24th day of December 1904. The subscribers hereto hereby waive notice of said meeting. In testimony whereof, We have hereunto set our hands on this the 24th day of December 1904.

54

M. W. KRAUSE.
WM. H. DILL.
J. E. GUIER,
SAM WARD.

Certificate.

Whereas, M. W. Krause, J. E. Guier, Wm. H. Dill and Sam Ward have associated themselves together as a body politic and corporate, to be known as the Citizens Bank & Trust Company.

And Whereas the said Corporators, being the subscribers to the capital stock of the said Corporation have waived the fifteen days' notice as required by law, and called a meeting for organization to be held in Okemah, I. T. at the office of Citizens Bank & Trust Company at 10 O'clock A. M. on the 24th day of December 1904.

Whereas, At the time and place above set out, a meeting of the subscribers aforesaid was held to organize said Corporation and elect three Directors.

And Whereas, At said meeting the following named persons were elected Directors, to-wit: M. W. Krause, Wm. H. Dill and J. E. Guier.

Whereas, At a meeting of the said Board of Directors M. W. Krause, was elected President, Wm. H. Dill was elected Vice-President and J. E. Guier as cashier and was elected Treasurer.

Now therefore, The said M. W. Krause, as President and the said Wm. H. Dill as Vice-President, J. E. Guier as Cashier, Sam Ward as Directors do in pursuance of law, issue this, their Certificate verified by their oaths, and do hereby certify as follows:

First. Said Corporation is formed for the purpose of doing a Banking said Trust Business and Corporated powers of the Citizens Bank & Trust Company. To act as agent, Trustee, Assignee, Receiver, Executor, Administrator, Guardian or other personal or legal represen-

tative when designated, or appointed by any person, company or corporation, or court to act as surety guarantor, and to make insurance for the fidelity of persons holding positions of trust and fidelity, and responsibilities by agreement by individual companies or corporations, (public or private) or by appointment by any court or tribunal; also on any undertaking, bon-, or bonds, which may be required to be filed in judicial proceedings; to act as executors, or testamentory guardian, when designated as such by will or to act as administrator or guardian, when appointed by any court or judicial officer or body having competent jurisdiction.

To act as agent, or trustee for the purpose of issueing or countersigning, the certificates of stock bonds or other obligations, of any corporation, association, municipality state or public authority to receive and manage any sinking fund thereof, upon such terms as may be agreed upon;

To make abstracts, real estate, and to personal property for its own use and the use of other persons, and to guarantee and insure owners of real estate from loss by reason of defective titles leins, and incumbrances. To do a general Trust and fiduciary and depository business. To receive and hold on deposit and in trust, and as security, estate, real and personal; diamonds, jewelry, plate stocks, note bonds, papers and obligations, and evidence of indebtedness or value, of states, counties, school districts, individuals, companies and corporations (public) and private, and valuable property of any description, and the same to be purchase-, make advances upon, collect, hypothecate, adjust, settle, sell and dispose of in any manner, without proceeding in law or in equity, for such price and on such terms as may be agreed upon with corporations, companies or individuals contracting with it. Provide suitable and sufficient fire and burglar and fire proof safe vaults, safe deposit boxes and other facilities, for the safe keeping of diamonds, jewelry plate, stock bonds, insurance policies, wills and other valuable papers, and property of every kind, intrusted to its care and capable of being cared for by the company. To carry on a general business, and exercise all the powers, responsibilities, and obligations, usual and proper for a safe deposit company. To receive money on deposit, either on current account or to be drawn upon by check, or on certificate payable at such time as may be desired or specified; with or without interest, as agreed upon by the depositor, and the corporation; to act as depository for banks, trust fund, receivership, assignee, court corporations and individuals; to buy and sell exchange, to buy, discount, sell, make advances upon, pledge and hypothecate all kinds of government, state, country, township, school district, municipal and other bonds, warrants and securities and all other kinds of negotiable paper, stock, bond mortgages evidences of indebtedness, and other investments, securities of individuals, companies and public and private corporations. To transact and do all such other things necessary, proper and usual in conducting a general banking business. To secure, take, purchase own, buy, acquire, sell, lease, mortgage, release, loan money upon or otherwise deal in, or dispose of any land, or interest therein, any real estate notes, secured by mort-

gages, trust deed, or interest thereon, any note secured by collateral, or interest thereon, any debenture bonds; public or private, with fixed security or interest therein, any share of capital stock of any incorporated companies, with or without dividends, any contract that evidences of indebtedness or any municipal public or private corporations, due or to become due any securities obligations, contracts, evidence of indebtedness of any kind or character, and other property, held or owned by corporation. To manage care for and do, any and all things tending to increase the value or improve the property of any and all realty, security or evidence of indebtedness held and owned by this corporation.

To issue debenture bonds, the payment of which is guaranteed by pledges of securities, placed in the hands of the trustees, or a legal incorporated trust company, secured to the same by a bill of sale, mortgage or trust deed, upon the whole or part of the securities held by the corporation, to sell or pledge such debentures or bonds, and to use proceeds for corporate purposes as the board of directors should determine. To assist its shareholders or other persons, in securing, acquiring, holding and improving real estate, by furnishing upon its securities there of all or a part of the capital on such terms of the payment as may be agreed upon. To acquire by purchase subscription, or otherwise, and to hold or dispose of stock bonds or
56 any other obligations, of any corporation formed for, or then or therefore engaged or pursuing any one or more of the kinds of business, purposes, objects or operations above indicated, or holding, or owning any property of any kind herein mentioned, or of any corporation owning or holding the stocks or obligations of any stock corporations/ to hold for investment or otherwise to use, to sell or dispose of, any stock, bonds of other obligations of any such other corporations; to aid in any manner any corporation whose stock, bond, or other obligation are held or in any manner guaranteed by this corporation, and to do any other act or thing for the preservation, protection, improvement or enhancement of the value of any such stock or bond or other securities, or to do any acts or things designated for any such purposes; and while owner of any such stocks, bond or other securities, to exercise all the right, power and privileges of ownership thereof and exercise any and all voting power thereon. To prospect for oil, coal, gas or other minerals on land owned or leased by the company, and acquire land either by purchase or lease, for the purpose of prospecting for such minerals and to operate wells, mines, shafts or pits for the purpose of taking oil, gas, coal or other minerals and to sell and to furnish oil, gas, coal or other mineral to any person, corporation, or municipality. To secure the segregation of lands for the townsite purposes as provided in act of congress approved March 3rd. 1903. To secure such transfers of Indian land under the rule of the Interior department as will lawfully permit the mortgaging of such land. To colonize any tribe or nation of Indians in the United States or any other country, either at their own expense or at the expense of this corporation. To do any and all things herein described for the purpose of attaining or furthering any of its objects, to do any and all other

acts and things and to exercise any and all other powers which a co-partnership of natural person should do or exercise and which may now or hereafter be authorized by law.

Second. Its capital stock is Twenty-five Thousand Dollars ($25,-000.00) divided into shares of $25.00 each.

Third. Ten ($10,000.00) thousand dollars of said capital stock have been actually paid in by the subscribers hereto.

Fourth. The names of the stockholders and the number of shares owned by them, *respectfully,* is as follows:

Names.	Number of Shares.
M. W. Krause, President	120
Wm. H. Dill, Vice-president	80
G. E. Guier, Cashier	160
Sam Ward	40

In testimony whereof, The said M. W. Krause, President of said Corporation and Wm. H. Dill, Vice-President, J. E. Guier, Cashier a majority of the Board of Directors of said Corporation, have hereunto set their hands on this Twenty-fourth day of December 1904.

M. W. KRAUSE, *President,*
WM. H. DILL,
J. E. GUIER, *Directors.*

57 UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

M. W. Krause, Wm. H. Dill and J. E. Guier, on their oaths say that the matters and things in the foregoing certificate set out are true, to the best of their knowledge and belief.

[SEAL.] H. G. MALOT,
Notary Public.

My commission expires July 2nd. 1906.

Endorsed on back as follows:—Filed this 17th. day of December 1907, C. E. Guthrie, Clerk. "Exhibit —A — to testimony of plaintiff. Certified copy of articles of agreement and incorporation of Citizens Bank & Trust Company of Stonewall, Indian Territory."

58 Second. Following the above and thereupon, plaintiff offered in evidence the stub of the stock books of the Citizens Bank & Trust Company, which were admitted and marked plaintiff's exhibit — and are as follows:

59 Certificate.
No. 1.
For eighty shares issued
to
M. W. Krause.
Original
Dated March 14th, 1905
from whom transferred.

Dated — 1905.
No. original Certificates: No. Original shares

No. of shares transferred.

Received Certificate No. One
For Eighty Shares this the 14th.
day of March 1905.

M. W. KRAUSE.

Certificates.
No. 2.
For Forty shares issued
to
M. W. Krause.
Original.
Dated March 14th, 1905
From whom transferred

Dated — 1905.
No. Original certificate No. Original shares

No. of shares transferred.

Received certificates No. Two.
60 For Forty shares
This 14th. day of March 1905.

M. W. KRAUSE,

Certificate
No. 3.
For Eighty shares issued
to
Wm. H. Dill
Dated March 14th. 1905
From whom transferred.

Dated — 1905
No. Original Certificates — No. original shares.

No. of shares transferred.

Received certificate No. 3
for Eighty shares
This 14th. day of March 1905.
W. H. DILL.

Certificate
No. 4
For 200 shares issued
to
J. E. Guier
Dated March 14th. 1905.
From whom transferred.

Dated * —— 1905.
No. Original certificate — No. Original shares

No. of shares transferred.

Received certificate No. 4
for 200 shares
This 14th. day of March 1905.
J. E. GUIER.

61

Certificate.
No. 5
For Eighty Shares issued
to
H. G. Malot.
Dated March 14th. 1905.
From whom transferred
M. W. Krause.
Dated March 14th. 1905.

No. Original Certificate	No. original shares.
1	80

No. of shares transferred.
80
Received certificate No. 5
for 80 shares
This 14th. day of March 1905.
H. G. MALOT.

Certificate
No. 6
For Forty shares issued
to
J. E. Guier.
Dated March 14th. 1905.
From whom transferred
M. W. KRAUSE,

Dated March 14th. 1905.

No. Original Certificates:	No. Original shares
2	40

No. of shares transferred.
Received certificate No. 6.
For Forty shares this 14th.
Day of March 1905.
J. E. GUIER.

62

Certificate.
No. 7
for Four shares issued
to
Blessingann, D. F.
Dated March 27th. 1905
From whom transferred
J. E. GUIER.
Dated — 190-.

No. Original Certificate	No. Original Shares
———	———

No. of shares transferred.

Received certificate No. —,
For — shares
This — day of — 190-.

Third: Following the above and thereupon, the plaintiff offered in evidence a certified copy of a judgment in case of Union National Bank vs. Citizens Bank & Trust Company, which was admitted marked plaintiff's Exhibit —, and was in words and figures as follows, to-wit:

63 In the United States Court for the Southern District of the Indian Territory, Sitting at Ada.

No. 708.

UNION NATIONAL BANK, of Kansas City, Missouri, Plaintiff,
vs.
CITIZENS BANK & TRUST COMPANY OF STONEWALL, I. T., Defendant.

Journal Entry.

[SEAL.]

Now on this 4th. day of October 1906, coming on for trial the demurrer of the defendant filed herein, having been heretofore withdrawn, and the defendant having been required to answer on or before this date, and having failed to answer or plead further, is held and declared to be in default herein. Upon the consideration of the evidence offered by the plaintiff and being fully advised in the premises it is considered that the plaintiff ought to recover from the defendant upon the causes of action set up in its complaint, sum of twenty six hundred forty-five ($2645.00) dollars and the costs of this action.

It is further ordered, adjudged and decreed that the plaintiff, the Union National Bank of Kansas City, Mo., have and recover of the defendant, the Citizens Bank and Trust Company, of Stonewall, I. T., the sum of ($2,645.00) together with the cost of this action.

It is further ordered that the receiver appointed and qualified in the above cause be and he is hereby continued in said trust subject to the further order of the Court.

(Signed) J. T. DICKERSON, *Judge.*

64 Endorsed as follows:

THE STATE OF OKLAHOMA,
County of Pontotoc, ss:

I, W. T. Cox, Clerk of the District Court of County and State aforesaid, successor to the Clerk of the United States Court for the Southern District of the Indian Territory sitting at Ada; do hereby certify that the instrument of writing on the reverse side hereof is a full, true and correct copy of the judgment in the cause of the Union National Bank, Kansas City, Missouri, vs. Citizens Bank & Trust Company of Stonewall, I. T., No. 708 and that said judgment remains unsatisfied and has not been appealed from as the same appears of record in my office.

Given under my hand and seal of office at Ada, Oklahoma, this 16th. day of December 1907.

(Signed) W. T. FOX,
Clerk District Court, Pontotoc County, Okla.

No. 708, Journal Entry.

UNION NATIONAL BANK, Kansas City, Mo., Plaintiff,
vs.
CITIZENS BANK & TRUST COMPANY, of Stonewall, Indian Territory, Defendant.

Exhibit "E" to testimony of Plaintiff.

No. 14.

W. H. EBEY, Receiver, Plaintiff,
vs.
M. W. KRAUSE et al., Defendant.

(Signed) C. E. GUTHRIE, *Clerk.*

65 Fourth: That plaintiff realizes that is is not possible to insert a correct transcript of the oral evidence produced at the trial since there was no stenographic report of the evidence taken, but suggests that the abstract of the evidence made by Mr. J. G. Potter is more nearly correct than that set out in the case made, and asks that the said abstract of the oral testimony be inserted in the case made in lieu of that inserted as follows, to-wit:

66 In the District Court for the Ninth Judicial District, Sitting for Okfuskee County, Oklahoma.

W. H. EBEY, Receiver, Plaintiff,
vs.
M. W. KRAUSE et al., Defendant.

Statement of Evidence, Behalf of Defendant Malot.

J. G. Potter, Attorney.

The issue between the Plaintiff and Defendant Malot is, "Did the defendant subscribe for Eighty (80) shares of the capital stock of the Bank?"

The testimony follows:

Articles of Incorporation.

Statement of receiver, W. H. Ebey, that he qualified and took charge of the books and affairs of the Bank.

Q. Where are the books?
A. I have them here.
Q. State what book this is?
A. It is the stock book.

Offered in evidence. Objected to by defendant Malot for the reason that said book has not been properly identified, and for the further reason that there is no proof that the signature of defendant appears in said book, and defendant has not been connected therewith. Overruled. Exception. Admitted as Plaintiff's exhibit "F."

TIMBERLAKE, on behalf of Plaintiff:

Q. Where do you reside?
A. Ada.
Q. What is your business?
A. Banker.
Q. How long have you been in that business?
A. Five years.
Q. What position?
A. Cashier.
Q. How much experience have you had in book-keeping?
A. Twelve years.
Q. Have you examined the books of the C. B. & T. Co., of Stonewall.
A. Yes sir.
67 Q. What books are these?

Objected to as not properly identified. Overruled. Exception.

A. The books of the Citizens Bank & Trust Company of Stonewall.

Entry on Stock Book.

Certificate No. 5.

For Eighty (80) shares issued to H. G. Malot.
Transferred from M. W. Krause, March 14th, 1905. H. G. Malot.

Q. Handing witness Book Bill Receivable, What is this entry?
A. May 24th. 1905 C. B. & T. Co., H. G. Malot ($2,000.00)
Q. What do you understand that entry to mean?

Objected to by defendant Malot for the reason that the question calls for a conclusion of the witness, and that the entry is irrelevant and immaterial and not tending to prove the issue in this case. Overruled. Defendant Excepts.

A. I take it to mean that May 24th. 1905 Citizens Bank & Trust Company loaned H. G. Malot, $2,000.00. Entry of May 24th. 1905 is a debit charge of H. G. Malot, note $2,000.00. Credit to Okemah Bank, Citizens Bank & Trust Company, and that the Stonewall Bank drew a draft on the Okemah Bank for $2,000.00, but does not show in whose favor the draft was drawn.
Q. Is that a proper entry?
A. Yes.
Q. What is this entry of December 23rd. 1906?

Objected to for the same reason. Overruled. Exception by Defendant Malot.

A. Entry, Bills Receivable, Check to Krause, $1060.00.
Q. What does the entry on the books at the date of opening show as to the stock subscribed by him?
A. Entry on opening date shows Krause paid into Okemah Bank $2,000.00 capital stock, to credit of the Bank of Stonewall, but does not show as to the Forty additional shares subscribed by him.
Q. What is the entry at the opening date as to W. H. Dill's stock?
A. Opening date shows W. H. Dill owned $2,000.00 capi-
68 tal stock and same was debited to the Citizens Bank & Trust Company of Okemah.
Q. What is the entry as to J. E. Guiers' stock?
A. J. E. Guier had one hundred and twenty (120) shares.

By Mr. POTTER:

Q. Do the books show that Malot owned any stock in the Citizens Bank & Trust Company of Stonewall on the opening day?
A. No they do not.

Witness LITTLE for Plaintiff:

Is acquainted with Malot and Stonewall Bank and was a depositor. Lost some money in the failure, did business with the Bank because he thought it was solid.
Q. Who were the officers of the Bank?

A. Krause was president: W. H. Dill was Vice-President and Mr. Guier was cashier.
Q. Did you ever talk with Mr. Malot in the Bank?
A. I talked with Malot in the Bank Building.
Q. Was he inside the railing?
A. No on the outside.

Cross-examination:

Q. What is your business?
A. Real Estate.
Q. How long have you been in that business?
A. Two years.
Q. What did you do before that?
A. Farmed a little.
Q. What else did you do?
A. Different things. Clothing.
Q. Were you ever a deputy marshal?
A. Yes three years.
Q. Why didn't you say so?
Q. How much did you loose in the bank?
A. $1141.00.
Q. Have you brought suit against these defendants to recover it?
A. Yes.
Q. You say you saw Malot in the Bank?
A. Yes.
Q. Well what do you know about Malot and the Bank?
A. I talked with him there.
Q. Well what did he say, what do you know about it?
A. ——.
Q. Tell it. You came here to tell something, you got a chance.
69 Q. How many times did you see Malot there?
A. Twice.
Q. How long apart were those times?
A. The evening and the next morning.
Q. What month was it when you saw him?
A. I don't remember, can't say.
Q. What was Malot doing there?
A. I don't know.
Q. Did Malot solicit you to do any business with the Bank?
A. No.
Q. Did he talk about the Bank?
A. No.
Q. Did you see Krause there?
A. No.

Continuation of TIMBERLAKE for plaintiff:

Q. How many years' experience have you had in judging signatures?
A. Five years.
—. Handing the witness the stock book of the Citizens Bank & Trust Company of Stonewall and calling the attention of the wit-

ness to a purported signature of H. G. Malot, and then handing the witness the answer of the defendant Malot, and pointing out the signature of the defendant, is the signature upon the stock book the same as the signature on the answer?

A. Yes I would think so.

Cross-examination by POTTER:

Q. Turning to the entry of May 24th, 1905, Malot Note $2,000.00 and the credit to the Okemah Citizens Bank, what would that indicate?

A. A Loan of $2,000.00 to Malot.

Q. Does the draft register show an entry of $2,000.00?

A. No.

Q. Handing witness exhibits 1-2-3-4-5-6-7-8-9-10-11-12 and calling the attention of the witness to the signatures of each, will you state to the Court whether the signatures appearing on these checks were made by the same person.

A. They were.

70 Q. Now comparing the signatures of the checks with the signature of Malot to the verification of his answer will you state to the Court whether in your opinion the signatures on the answer was made by the same person who signed the checks?

A. It is the same signature, made by the same person.

Q. You stated that the signature appearing on the stockbook was in you- opinion made by the same person who made the signature to the defendant Malot's answer.

A. Yes.

Q. Now calling the witness'*es* attention to the signature on the stockbook and the signatures on the checks, will you swear that the same persons who signed the stockbook signed these checks?

A. No I will not.

Q. Why.

A. Because the signatures are different.

Q. Why do you say the signatures on the stock book and the answer is the same, and that the signature on the answer and the checks is the same, and yet you will not swear that the signature on the checks and the stock book are the same?

A. They are different. There is two years' difference in time.

Q. How different. The checks are as old as the answer why can you tell so sure of the answer and then not the checks. A. Because the slope is different, and the G. is sharp in the Checks.

Defendant Malot now offers in evidence the checks marked Exhibit One (1) to Twelve (12) inclusive, and the signature of Malot to answer exhibit Thirteen (13).

Q. What about the entry Bills Receivable May 1905, Malot Note, does this entry show anything about this note being paid.

A. Entry Bills Receivable record shows Malot date May 1905, 12 Month $2000. 8%. Note shows paid on record.

Receiver EBY:

Cross-examination.

By J. G. POTTER, for Def't Malot:

Q. Did you find note or notes of Malot, Krause, or Guier?
71 A. No.
Q. Did you find any note or entry showing Malot owing the Stonewall bank except in bills receivable showing Malot Note of $2000 and showing on the margin that the same was paid?
A. No.

Plaintiff Rests.
Defendant Malot demurs orally. Court requires demurrer in writing. Def't Malot does not insist on demurrer.

Evidence on behalf of Def't MALOT:

Q. Are you acquainted with the Stonewall Bank?
A. Yes.
Q. What dealings have you had relative to this bank?
A. I took the acknowledgment of the incorporators.
Q. Have you had any business dealings with this bank?
A. No.
Q. What do you know about the subscription and payment of capital stock in said bank.
A. Nothing except the statements in the acknowledgment of the Articles of incorporation.
Q. Did you on March 14th, 1905 or at any other time subscribe for 80 shares of the capital stock of the Citizens Bank and Trust Company of Stonewall?
A. No.
Q. Did you ever agree to pay said bank any sums of money for stock or any other liability to said bank?
A. No.
Q. Do you owe said bank any money on stock subscriptions or otherwise?
A. No.
Q. Did you have a business transaction with Krause relative to this bank?
A. Yes.
Q. When?
A. March 14th, 1905.
72 Q. What was the transaction?
A. It was about a loan to be made by Krause to the Cashier of the Stonewall Bank. Guier wanted Krause to make the bank a loan and Krause refused unless I would execute notes to secure the payment of the money. Guier wanted me to take some stock and I refused but agreed to secure the Krause loan if Krause's Stock in the bank was held as security for me.
Q. Did you execute the two notes for the $2000?
A. Yes, I did.

Q. Have you those two notes with you?
A. I have one of them.
Q. Were they returned to you?
A. Yes.
Q. Where is the other note?
A. I have searched for it at the bank and could not find it.
Q. You have one of them with you?
A. Yes.
Q. Handing the witness this paper I will ask you to state whether this is the one note you mention as given by you to Krause as security for the said loan to the Stonewall bank.

Objected to by plaintiff because the same is mutilated. Sustained.
By Mr. POTTER: I have not offered this paper in evidence yet.

Q. Mr. Malot did you sign this note?

Objected to by Pl. Sustained.

A. Yes.
Q. Was the signature torn off after you delivered this note to Krause?

Objected to by plaintiff. Sustained.

Q. Was this note received by Mr. Krause and afterwards returned to you?

Objected to for same reason and sustained.
Exception.

Q. Did you sign and deliver this note to Krause as se-
73 curity for the bank in the making of the said loan of $2000 to the bank?

Objected to as immaterial and same as mutilated. Sustained. Excepted.
Mr. POTTER: Mr. Clerk will you mark this paper Exhibit 13.
Objected to by plaintiff as not admitted in evidence.
Mr. POTTER: I have not offered the note in evidence yet.
Mr. POTTER: I now offer the note to opposing counsel for cross examination.
Not accepted.
Defendant Malot now offers in evidence the note marked Exhibit 13, for the purpose that defendant executed the notes as alleged to secure the payment of the $2000 to Krause by the Stonewall Bank, and offers the payment of the note that it expressly provides that the same was given as security on its face, offers to prove by the witness Malot that he signed said note and delivered the same to Krause as Security as mentioned, that said note was returned to defendant and that the name of defendant Malot had been torn from the note after its delivery to said Krause, and after the settlement of the indebtedness to Krause.
To which plaintiff objects for the reason that said note is mutilated. Sustained.
Defendant Malot excepts.

Q. Mr. Malot did you execute and deliver to Krause your notes in the sum of $2000 for the purpose of securing the payment by the bank of the two thousand dollars to Krause.

A. I did.

Q. I now call the attention of Witness to certificate No. 5 in the stock book of the Citizens Bank & Trust Company of Stonewall and ask the witness to state to the Court whether the signature appearing upon said certificate was made by the witness.

A. It was not.

Q. Did you authorize it to be made?

A. I did not.

Cross-examination.

74 Q. Are you not the V.-President of the Citizens Bank and Trust Co. of Okemah?

A. I am.

Q. Is W. H. Dill V. President of the Stonewall Bank?

A. Yes.

Q. Were you at the meeting held in Okemah, March 14th with Guier, Krause and Dill?

A. I was in the bank. I had no interest.

Q. You state that you signed the notes for security to Krause?

A. Yes.

Q. Why did you do it?

A. I did because Krause asked it and Guier wanted me to and it was agreed that Krause's stock should be held as security for me.

Q. Did you pay the notes?

A. No, they were returned to me when Krause got his money back.

Q. Were the notes marked paid?

A. No.

Q. What were you doing at Stonewall?

A. I found out when the Krause deal was straightened up that stock had been issued to me and I went there to have my name taken off the books as a stockholder and to make a statement to file in the office of the Clerk at Ada. I never was there but once.

Q. Did you ever borrow any money from the Stonewall Bank?

A. No and I never paid the Stonewall bank any money and if it says I did it is a false entry.

BERT FLESHER:

Witness stated he resided in Okemah, six years in banking business, knew Malot's writing and was acquainted with his signature.

Handing witness stockbook of Stonewall bank and pointing out the alleged signature of Malot on Certificate No. 5, from your knowledge of handwriting and your acquaintance with the signature of H. G. Malot state to the court whether in your opinion this signature was made by Malot.

A. No sir I do not.

75 Cross-examination:

By WITTEN:

Q. Is this Malot's signature on the answer filed by him?
A. Yes sir.
Q. What is the difference?
A. The signatures differ in the formation of the letter M and other letters.

E. T. WHITE:

Acquainted with Malot business dealings five years, familiar with his signature.

Q. Handing the witness stock book of Stonewall bank and calling the attention of witness to certificate No. 5, I will ask you to state to the Court from your knowledge of the writing and signature of H. G. Malot, whether in your opinion that signature was made by H. G. Malot.
A. No I don't think so.
Q. Why don't you think so?
A. Because this signature is in light handwriting and Malot writes a heavy hand, and there is a difference in the leter M, and the writing is back hand.

W. N. BARRY:

Lived in Okemah 5 years county commissioner, knows Malot, is acquainted with his writing and signature, has had occasion many times to handle checks and take his acknowledgement, is also a bookkeeper.

Q. You will please examine the signature appearing on the stock book of the Stonewall bank on Certificate No. 5 and state from your knowledge of H. G. Malot's writing and signature whether in your opinion, that signature was made by H. G. Malot.
A. It resembles it some but it is not his signature, if Malot signed that he changed his hand writing.

M. W. KRAUSE for Plaintiff. Rebuttal:

— Were you originally a stockholder in the Stonewall Bank?
A. Yes.
Q. Were you present at the meeting Mar. 14, 1905 at Okemah?
A. Yes.
Q. Did you make a loan of $2000 to Stonewall Bank?
A. No. I sold my stock to Malot and took certificate of deposit for it, and got my money after six months. I got the money at Dustin from the Stonewall bank by cashier check, bank at
76 Dustin paid me. This was $1040 and three months after I got $1060. I sold all my stock in the bank to Malot and took certificate of deposit, he signed certificates of deposit.

Cross-exam. by POTTER:

Q. Did you take Malot's notes when you claim to have sold him your stock?

A. No not that I remember of.

Q. In a conversation with Perry Rodkey and myself about seven miles north east of Dustin in June, 1906 did you not state that you loaned the Stonewall bank $2000 and that Malot went security for its payment, and that you would not loan the money to the bank unless Malot gave you his note as security.

A. No, you must have misunderstood me.

Q. Did you not say at that time that you and Guier asked Malot to take stock in the bank and that Malot refused and——

A. Yes he said he didn't have the money, he had use for his money.

Q. What made you want to quit the bank?

A. Because Dill, Guier and Ward organized the bank when I was not present and made me president. I wanted to draw out and they would not let me. I do not deny my signature on the stock book, it looks so much like mine.

I did not think any stock was issued to me. I sold to Malot and they gave me time certificate, and Malot secured me and Malot paid me. I did not want to go in; none paid any money by me, I don't think they paid any but I don't know.

Q. Then you don't know whether any one paid, you're only guessing at it?

A. I don't know.

POTTER for Defendant Malot:

Q. What is your business?

A. Attorney.

Q. Did you hear Mr. Krause- statement relative to the conversation claimed to have been had between you, Rodkey and Krause near Dustin.

A. I did.

Q. What was that conversation?

A. Mr. Rodkey and myself went to Dustin after the cases in the Court at Ada were filed to find out what Krause knew about this deal. Krause told us that the only thing Malot ever had to do with the bank so far as he knew was to take the acknowledgement of the papers, and afterwards to sign note as security for the Stonewall bank to secure him, Krause in a loan of $2000 that he was
77 about to make the bank at the request of Guier.

That Krause stated that he told Guier that he would not make the loan to the bank unless Malot whom he knew slightly would go his security, and that Malot finally agreed to do so if Krause's stock $2000 was held by the bank as security for him. That this transaction was carried out. That at the time this loan was made Guier and Krause asked Malot to take stock in the bank but that Malot refused saying he did not have the money to spare.

Cross-exam. WITTEN:

Q. You went to see Krause as attorney for Malot?

A. I did. I went to find the truth and the answer of Malot in this

case was made from the facts stated to me by Krause at that time and confirmed by Malot.

Q. Why did you go there?

A. Because of the cases the government had filed at Ada, it was before this case was started.

Q. You went as Malot's attorney.

A. Yes.

By PATTERSON:

Q. Did you not write a letter to Krause asking to look after his case also, because you claimed your interests were the same?

A. I wanted the case because Krause furnished me with the facts in Malot's case, and the cases were not inconsistent. Krause told me a different story before he fell into the hands of you wolves.

Q. Did you not talk to him about the case yesterday?

A. I talked about going to trial. I told him we could win it now and that it had hung long enough.

Testimony completed.

78 Fifth: On page 33 following the words "the court announces its decision in said cause as follows, to-wit:

In the District Court, Ninth Judicial District. Okfuskee County, Oklahoma.

W. H. EBEY, Receiver, Plaintiff,
vs.
M. W. KRAUSE et al., Defendants.

Opinion.

This is an action by W. H. Ebey, Receiver, against W. H. Dill, H. G. Malot, and others, to recover from the defendants the amount of capital stock subscribed by them in the Citizens Bank and Trust Company of Stonewall, Indian Territory.

The bill alleges that on or about the 14th day of March 1905, the defendants with some others as incorporators, organized the Citizens Bank and Trust Company of Stonewall for the purpose of transacting a general banking and trust business, and M. W. Krause was elected President, W. H. Dill was elected Vice-President, and J. E. Guier was elected Cashier, and that said officers with one Sam Ward constituted the first Board of Directors of said Citizens Bank & Trust Company, and that the articles of incorporation and certificate thereof were duly filed with the Clerk of the United States Court of Appeals of Indian Territory at South McAlester at then required by law, that the certificates recited that the capital stock of said Citizens Bank and Trust Company was $25,000.00, and that there had been ten thousand dollars ($10,000.00) of said capital stock actually paid in.

The bill, among other things, alleges that the defendant W. H.

Dill subscribed eighty shares, and that H. G. Malot subscribed
79 eighty shares of the Capital stock and that on the 14th day of March, 1905, there was issued certificates No. 3 for eighty shares of capital stock to W. H. Dill, and on the same date certificate No. 5 for eighty shares of capital stock of said Bank was issued to H. G. Malot, that said shares were worth twenty five dollars ($25.00), which both of these defendants undertook and agreed to pay said Banking Company par value of the eighty shares of the stock issued to them, amounting in all to two thousand dollars ($2,000.00) each.

The bill further alleges the facts to be that only one of the stockholders in the original suit, towit: M. W. Krause, paid any part of the par value of said stock, or anything of value of the stock subscribed for by them, and alleges that the said original stockholders organized said Citizens Bank and Trust Company without any purpose or intent to pay for its capital stock, or any part thereof, except the two thousand dollars ($2,000.00) paid in by the defendant Krause. The said Citizens Bank and Trust Company was insolvent on the 20th day of February 1906, and on the petition of one of its creditors the plaintiff was appointed Receiver by the United States Court for the Southern District of the Indian Territory, that the liabilities of said Citizens Bank and Trust Company at the time the plaintiff took charge of the assets as receiver was shown by its books to be fifteen thousand one hundred seventy-nine dollars and two cents ($15179.02), and that after six months effort the Receiver has only been able to collect of the entire assets of the bank sixty dollars and fifty cents ($60.50), and to realize on other property the sum of one hundred dollars ($100.00). Plaintiff
80 prays for a decree in his favor as Receiver against the stockholders, of which W. H. Dill and H. G. Malot are two, for judgment of two thousand dollars ($2,000.00) and interest, the amount of the stock plaintiff alleges was subscribed by them and which was never paid.

The defendant William H. Dill answering admits that he was a stockholder in said Banking Company and he was elected Vice-President of said Company, and does not deny that he was Vice-President at the time the Bank went into the hands of a receiver, but sets up as a matter of defense that he paid the full sum of two thousand dollars ($2,000.00) to the bank for the capital stock subscribed by him, and therefore denies any liability or indebtedness to the plaintiff.

The Defendant H. G. Malot denies that on the 14th of March 1905, or at any time he ever subscribed for eighty shares of the capital stock of said Citizens Bank and Trust Company, or subscribed for any amount of the capital stock of said bank, denies that he ever agreed to pay to said Bank any sums whatever upon stock subscribed, or any other liability, and denies he ever owned any stock in the said Bank and Trust Company, and denies he owes said Bank any sum of money whatever, but alleges the fact to be that he signed a note as payable to one of the defendants, Krause, as security to Krause for the sum of two thousand dollars ($2,000.00) that the de-

fendant Krause agreed to loan the said Bank with the condition that the two thousand dollars ($2,000.00) in shares of stock subscribed and owned by the defendant Krause should be held by the Bank as security to him.

81 The question here presented is largely one of fact. It is a too well settled principal of law in this country, to admit of discussion, that the capital stock of a corporation is a trust fund for the payment of its creditors, and that the creditors have an equitable lien or charge upon it superior to that of the stockholders, and it may be further stated as a sound principal of law that the Directors and Officers of a corporation who have charge of the corporate assets, or upon whom a duty is imposed by law to safely guard its assets, are, in a sense, trustees of the creditors of the corporation. The defendant, H. G. Malot swears positively that he never subscribed for any of the capital stock, and also swears positively that he never agreed to pay said Bank any sum of money for stock or any other liabilities of said Bank. He explains his connection with said Bank by saying, as follows: "It was about a loan to be made by Krause to the cashier of the Stonewall Bank; Guier wanted Krause to make the Bank a loan and Krause refused unless he would execute notes to secure the payment of the money; Guier wanted me to take some stock and I refused, but agreed to secure the Krause loan if Krause's stock in the Bank was held as security for me." In explanation of certificate No. 5 in the stock book of the Bank, which appears from the stub-book was receipted for by the defendant Malot on the 14th day of March 1905, the defendant Malot denies the signature thereto — be his signature, and denies that he authorized it to be made for him. He is corroborated in this part of his testimony by Bert Flesher and E. T. White, and W. M. Barry, who testified as to his signature. In view of this testimony, I am of the opinion that the plaintiff failed to make out his case as against the defendant

82 H. G. Malot; on the other hand, the evidence preponderates in favor of the contention that the defendant was never a subscriber of the stock as alleged in plaintiff's petition.

The question that has given me more serious concern, and a great deal of difficulty in arriving at a conclusion is the liability of the defendant William H. Dill. The evidence shows by the entry in the blotter of the Citizens Bank and Trust Company of Stonewall that he had deposited for it two thousand dollars ($2,000.00) in payment of his subscription with the Citizens Bank and Trust Company of Okemah; the evidence further shows that on the 13th day of March, 1905, the defendant William H. Dill drew a check payable to the citizens Bank and Trust Company of Stonewall for the sum of two thousand Dollars ($2,000.00). There is some evidence that the check was paid by the Citizens Bank and Trust Company of Okemah by crediting it on its books to the Citizens Bank and Trust Company of Stonewall, and to the effect that it was charged to the private account of W. H. Dill, but the fact that the check drawn by W. H. Dill, who was President of the Citizens Bank and Trust Company of Okemah, and also Vice-President of the Citizens Bank and Trust Company of Stonewall, fails to bear any evidence of endorse-

ment on it by the Citizens bank and Trust Company of Stonewall or any of its officers, and the further fact of the close business relation that existed between M. B. Flesher and the Citizens Bank and Trust Company of Okemah of which the defendant W. H. Dill was President, who testified in Dill's behalf as to the payment of the check this being the only corroborative evidence of payment and the further fact that the testimony of Mr. Timberlake, an expert banker and bookkeeper and an entirely disinterested witness, testified that after a thorough examination of the books of the Citizens Bank and Trust Company of Stonewall, there is nothing in those books
83 to show that the two thousand dollar- ($2,000.00) alleged to have been paid by Mr. Dill at the Citizen- Bank and Trust Company of Okemah ever found its way to the Citizens Bank and Trust Company of Stonewall, or that it was ever paid on its order or for its benefit, and the further fact that the defendant, W. H. Dill, was present when this case was being tried and failed to testify and say whether, as a matter of fact, the money represented by this check, and signed by him, was ever in fact received by the Citizens Bank and trust Company of Stonewall for the benefit of its creditors to perform the functions of a trust fund for them, all go to convince the court that the plaintiff has made out his case by a preponderance of the evidence as against the defendant W. H. Dill.

The Circuit Court of Appeals of the eighth Circuit, in an opinion delivered by Judge Colwell in case of Gulf C. & S. Ry. Co., vs. Ellis, reported in fourth Circuit Court of Appeals, page 454, lays down this wholesome doctrine: "It is a well settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support the inference against him, and the jury is justified in acting upon that conclusion," and quoting from Lord Mansfield, the Court further says: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." That other well settled maxim of Equity Jurisprudence, which is in substance that, where one of two innocent parties must suffer, the one making it possible for injury and wrong to be committed
84 must, as between the two, bear the burden, may very properly be invoked in this case. There are, no doubt, many innocent depositors and other creditors, some of whom may have deposited in this institution the accumulated earnings of their toil and labor covering a period of months or years. It is the duty of Courts of Equity to protect the weak as well as the strong and cunning. Banking Institutions should be monuments to the integrity and high personal equasion of its officers; by their dealings with their customers and the public generally they should inspire a wholesome confidence to be relied upon by those less experienced in business and the intricacies of commercial life. The defendant, by virtue of the position he held, was, in the judgment of this Court, charged

with the duty of protecting the Trust fund which his subscription represented for the benefit of the creditors of the institutions of which he was Vice-President, and in view of all the evidence, the Court is compelled to pronounce judgment in favor of the plaintiff as to the Defendant W. H. Dill. The Court takes this view of the case reluctantly after much consideration and thought. The plaintiff in this case, and all the parties whom he represents are strangers to the Court; on the other hand, the defendant is a citizen of my own town of high business and social standing, but the conscientious Judge in the discharge of his duty cannot know any man, but must decided the law in the language of that familiar maxim Lex Scripta est.

—— ——, *Judge.*

Okemah, Okla. March 25, 1908.

Filed Sep. 7, 1908, W. H. L. Campbell, Clerk of the Supreme Court, By —— —— deputy.

85 Sixth. Immediately following said entry, whereupon the following judgment and Journal Entry was entered in said cause, which was in words and figures following, namely:

STATE OF OKLAHOMA,
Okfuskee County, ss:

In the District Court in and for said County.

W. H. EBEY, Receiver, Plaintiff,
vs.
M. W. KRAUSE et al., Defendants.

Journal Entry.

Now this 16th day of December, 1907, same being one of the Judicial days of the December 1907 term of said court, the above cause coming on for trial, the plaintiff appearing by his attorneys, and the defendants, W. H. Dill, H. G. Malot and M. W. Krause being present and by attorneys said cause is by agreement continued for the term as to the Defendant M. W. Krause, and the Defendants W. H. Dill and H. G. Malot announcing ready for trial, the trial of said cause is begun. The taking of testimony offered by the Plaintiff not having been completed when the hour of adjournment arrived, said cause is continued until the following day.

Now on this 17th day of December 1907, the Court convening in regular session pursuant to adjournment, the taking of testimony in said cause was continued. After hearing evidence offered by the Plaintiff, and that introduced by the Defendants, and the evidence offered in rebuttal by the plaintiff, said cause is submitted to the Court and the Court taking the same under advisement and the matter is continued until March 1908 Term.

86 Now on this 25th day of March 1908, the same being one of the regular judicial days of the March 1908 term of said

Court, the court announced its decision in said cause, as follows, to-wit: That after considering the evidence and the law I find for the defendant H. G. Malot and against the defendant W. H. Dill, that the plaintiff was entitled to a decree against the defendant W. H. Dill on the cause of action set out in his complaint in the sum of two thousand dollars ($2,000.00), together with interest thereon from March 14, 1906, and the cost of this action, incurred by him, assessed at — dollars, ($—).

It is therefore ordered, adjudged and decreed by the Court that the plaintiff take nothing by its said action against the Defendant H. G. Malot, and that he (H. G. Malot) be, and is hereby dismissed with his costs, and that the Plaintiff W. H. Ebey, as Receiver of the Citizens Bank and Trust Company of Stonewall, do have and recover of and from the defendant W. H. Dill the sum of two thousand dollars ($2,000.00) together with interest thereon at the rate of six per cent per annum from the 14th day of March 1906, and the costs incurred by him in this action assessed at — dollars ($—), for which sum let execution issue.

——— ———,
Judge Ninth Judicial District, Oklahoma.

Filed Sep. 7, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By ——— ———, Deputy.

87 Seventh. On Page 15, we ask that the motion for transfer of the case from Okmulgee to Okemah and the order of transfer be set out in full—which motion and order are in words and figures following, towit:

Eighth. The plaintiff also calls attention to the fact that on page 10, the parts enclosed in brackets are not in the copy of the motion served on him, and suggests that these parts of the motion should be stricken from the case made. And plaintiff prays the above amendments be made by the Court to the case made, as made and served by Defendant, W. H. Dill.

W. W. WITTEN,
GALLRAITH & McVEOUR,
Att'ys for Pl'ff.

Filed Sep. 7, 1908. W. H. L. Campbell, Clerk of the Supreme Court, By ——— ———, Deputy.

To W. H. Dill, Defendant, or C. T. Huddleston, Esq., his attorney of record in the above styled cause:

I hereby accept service of the above and foregoing suggestion of amendments to the case made, this 21st day of May, 1908.

C. T. HUDDLESTON,
Attorney for Defendant, W. H. Dill.

In the District Court in and for Okfuskee County, Oklahoma, June 10th, 1908.

STATE OF OKLAHOMA,
Okfuskee County, ss:

88 Be it remembered: That on this 10th day of June, 1908, at four o'clock P. M., in the court house in the City of Okemah, in Okfuskee County, State of Oklahoma, the above and foregoing case made, together with the amendments suggested thereto by the plaintiff was presented to me, John Caruthers, Judge of the District Court of said County, before whom said cause was tried, to be settled and signed as the original case made herein as required by law, between the parties to said cause, C. A. Galbraith, being present representing the plaintiff and C. T. Huddleston being present and representing the defendant, William H. Dill; and it appearing to me that said case made, together with the amendments as suggested by the plaintiff, have been made and served within the time fixed by the order of this Court and in the time and in the manner and form provided by law; and said case made and the amendments suggested and attached thereto having been examined by me is true and correct, and contains a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in said cause and I hereby allow, certify and sign the same as the true and correct case made in said cause, and hereby order that the clerk attest the same with his name and the seal of said Court and file the same of record as provided by law.

Witness my hand and official signature this 10th day of June, 1908.

JOHN CARUTHERS,
Judge of the District Court of Okfuskee County, Oklahoma.

Attest:
C. E. GUTHRIE,
Clerk of the District Court of Okfuskee Co., Ok.

Filed Sep. 7, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

89 *Certificate of True Copy.*

STATE OF OKLAHOMA,
Okfuskee County, ss:

I, C. E. Guthrie, Clerk of the District Court in and for the County and State aforesaid, do hereby certify *that* the above and foregoing Case-Made, to be a full, true and complete copy of an original Case-made in the above entitled cause, filed in my office on the 10th day of June, 1908, and as now appears on file in my office.

Witness my hand and the Seal of the said Court, this 31st day of August, 1908.

[SEAL.]

C. E. GUTHRIE,
District Clerk.

Filed Sep. 7, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

90 Endorsed on back as follows: No. 381 W. H. Dill et al., vs. W. H. Ebey, Receiver. Petition in error and Case made. Filed Sep. 7, 1908. W. H. L. Campbell, Clerk Supreme Court.

91 And thereafter, to-wit: On the 20th day of April, 1908, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, March Term, 1909, April 20th, 1909, Twenty-fifth Judicial Day.

#381.

W. H. DILL et al., Plaintiff in Error,
vs.
W. H. EBEY, Rec'v'r, Defendant in Error.

Ordered by the court that motion of plaintiff in error in above cause for leave to file briefs, be, and the same is hereby sustained.

92 And thereafter, to-wit: On the 18th day of October, 1909, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

#381.

W. H. DILL et al., Plaintiffs in Error,
vs.
W. H. EBEY, Receiver, Defendant in Error.

Ordered by the Court that the motion in the above cause for order to permit correction of Judge's certificate be, and the same is hereby sustained, correction to be made within 30 days, upon 5 days' notice to opposite side.

93 And thereafter, to-wit: on the 13th day of January 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, January Term, 1910, January 13th, 1910, Third Judicial Day.

#381.

W. H. DILL et al., Plaintiffs in Error,
vs.
W. H. EBEY, Receiver, Defendant in Error.

And now this cause is argued orally and the cause submitted on the record, briefs and oral argument and it is ordered by the court that plaintiffs in error be allowed 5 days to file typewritten brief and defendant in error 5 days to file typewritten brief.

94 And thereafter, to-wit: on the 10th day of May 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, May Term, 1910, May 10th, 1910, First Judicial Day.

#381.

W. H. DILL et al., Plaintiffs in Error,
vs.
W. H. EBEY, Receiver, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having duly considered the same and being fully advised in the premises, finds: That the judgment of the court below in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the court below in the above cause be, and the same is hereby affirmed.

Opinion by Kane, J.

All the Justices concur.

95 In the Supreme Court of the State of Oklahoma.

No. 381.

W. H. DILL et al., Plaintiffs in Error,
vs.
W. H. EBEY, Receiver of the Citizens Bank and Trust Company of Stonewall, Defendant in Error.

(Filed May 10, 1910.)

1. A Complaint in a suit in equity wherein E, as receiver of an insolvent bank, joins certain subscribers to the capital stock of the

bank as defendants, for the purpose of recovering unpaid subscriptions, that further alleges, in substance, that the judge of the court wherein said receiver was appointed, upon application of creditors, supported by a showing that the bank was entirely insolvent and without assets sufficient to distribute any part thereof to the bank or its shareholders, entered an order directing said receiver to retain counsel and institute proper proceedings against the defendants as subscribers for the capital stock of said insolvent bank to recover the respective amounts remaining unpaid on said subscription, or for the stock issued to them, for the benefit of all the creditors of said bank, and that this suit is filed in compliance with said order, states facts sufficient to warrant the trial court to treat such suit as one brought by the creditors of said insolvent bank over which a court of equity has jurisdiction and in which all the subscribers to the capital stock may properly be joined as defendants.

2. Under such circumstances the right to maintain suit against the individual stockholders of an insolvent corporation to enforce their liability on unpaid stock subscriptions does not constitute such a plain, full, adequate remedy at *al*w as to defeat a suit in equity against all stockholders for the collection and administration of the corporate assets as a trust fund for the benefit of the creditors.

(Syllabus by the Court.)

Error from the District Court of Okfuskee County.

Before John Caruthers, Judge.

Affirmed.

96 John H. Burford and C. T. Huddleston, attorneys for plaintiff in error.

Clinton A. Galbraith, Tom D. McKeown, and W. W. Witten, attorneys for defendant in error.

Opinion of the Court by

KANE, *J.:*

This suit was filed prior to statehood, in the United States court for the Western district of the Indian Territory, sitting at Okmulgee, on the equity side of the docket, by the defendant in error, W. H. Ebey, as receiver of the Citizens Bank and Trust Company of Stonewall, as plaintiff, against the plaintiff in error, M. W. Krouse, W. H. Dill, H. G. Malot, J. E. Guier and Sam Ward, as defendant-. The complaint, omitting the caption, is in words and figures as follows:

"Comes now the said plaintiff and represents that he is the duly appointed, qualified receiver of the Citizens Bank & Trust Company of Stonewall, Indian Teritory, a corporation, organized under the laws of the Indian Territory and engaged in business at Stonewall prior to the time of the appointment of the plaintiff as its receiver, and that the defendants W. H. Dill and H. G. Malot, are citizens of the Western District of the Indian Territory, and reside nearer to

Okmulgee than any other place of holding court in said district, and for cause of action the plaintiff avers: 1. That heretofore, to-wit, on or about the 14th day of March, 1905, the said defendants, M. W. Krause, J. E. Guier, W. H. Dill and Sam Ward as cor-
97 porators, organized the Citizens Bank & Trust Company for the purpose of transacting a general banking and trust business at Stonewall in the Indian Territory; that M. W. Krause was elected president, and W. H. Dill was elected vice-president and J. E. Guier was elected cashier of said corporation; that said officers together with Sam Ward constituted the first board of directors of said Citizens Bank & Trust Company, and the articles of incorporation and certificate required by law were filed with the clerk of the United States court of appeals for the Indian Territory, at South McAlester, on the 13th day of February, 1905; that the objects and purposes of said corporation were set out in detail in the certificate filed as aforesaid, and said certificate also recites that the capital stock of said Citizens Bank & Trust Company is and was twenty-five thousand dollars ($25,000), divided into shares of twenty-five dollars each, and that ten thousand dollars of said capital stock had been actually paid in by the subscribers and that the names of the stockholders and the number of shares subscribed for by them are as follows: M. W. Krause, president, 120 shares; W. H. Dill, 80 shares; J. E. Guier, 160 shares; and Sam Ward 40 shares; that on the said 14th day of March, 1905, as the plaintiff is advised and believes, and on such information and belief, alleges the fact to be, H. G. Malot subscribed for 80 shares of the capital stock of the Citizens Bank & Trust Company, taking 40 shares of the 160 shares subscribed for by J. E. Guier, and 40 shares of the 120 subscribed for by M. W. Krause; that on the said 14th day of March, 1905, there was issued certificate number 1 to M. W. Krause for 80 shares of the
98 capital stock of the said Citizens Bank & Trust Company; that on the same day certificate number 3 for 80 shares of the capital stock of the said Citizens Bank & Trust Company was issued to W. H. Dill; that on the same day certificate number 5 for 80 shares of the capital stock of said Citizens Bank & Trust Company was issued to H. G. Malot; that on the same day certificate number 4 for 120 shares of the Capital stock of the said Citizens Bank & Trust Company was issued to J. E. Guier; that on the same day certificate number 6 for 40 shares of the Capital stock of the said Citizens Bank & Trust Company was issued to Sam Ward; that each of the said defendants undertook and agreed to pay the said Citizens Bank and Trust Company the par value of the respective shares of stock issued to them, namely: That M. W. Krause undertook and agreed to pay to the Citizens Bank & Trust Company for the 120 shares of stock issued to him, the sum of three thousand dollars; that H. G. Malot undertook and agreed to pay the par value of the 80 shares of stock issued to him, to-wit, two thousand dollars; that W. H. Dill undertook and agreed to pay said Citizens Bank & Trust Company the par value of the 80 shares of stock issued to him, to wit, two thousand dollars; that Sam Ward undertook and agreed to pay said Citizens Bank & Trust Company the par value of the 40

shares of stock issued to him, to wit, one thousand dollars; that J. E. Guier undertook and agreed to pay said Citizens — and Trust Company the par value of the 120 shares of stock issued to him, to wit, three thousand dollars. That plaintiff is advised and believes and on such information and belief, alleges the facts to be that the only one of said defendants who paid any part of the par
99 value of said stock or anything of value for the stock subscribed for and issued to them, was the defendant M. W. Krause, who paid to said Citizens Bank & Trust Company the sum of two thousand dollars; and that after said sum had been paid the same was later returned to said defendant; and, as plaintiff is informed and believes, and on such information and belief alleges, the fact to be, the said defendants organized said Citizens Bank & Trust Company without any purpose or intent to pay for its capital stock or any part thereof, except the two thousand dollars paid in by the defendant, Krause, and that this sum was paid in with the distinct understanding that it should be returned after the corporation came to be a going concern, the sworn statement in the certificate of incorporation, that ten thousand dollars had been actually paid in to the contrary notwithstanding. 2. That the said Citizens Bank and Trust Company was and is insolvent and on the 20th day of February, 1906, on the petition of one of its creditors the plaintiff was appointed by the United States Court for the Southern district of the Indian Territory, receiver to take charge of all of its property and effects, and to administer the same under the order of said court, for the benefit of all its creditors; that the liabilities of said Citizens Bank & Trust Company at the time the plaintiff took charge of its assets as receiver, as shown by its books, were $15,179.02; that a great deal of the paper of said Citizens Bank and Trust Company is worthless and a very small sum can be realized from the same and the rest of its assets; that after six months afforts the plaintiff
100 has only been able to collect on notes $60.50, and to realize on other property the sum of $100.00; that all of the capital stock of said Citizens Bank & Trust Company represented as paid in, namely, ten thousand dollars, and the assets in the hands of the plaintiff, as receiver, will not be sufficient to pay to the creditors of said Citizens Bank & Trust Company. 3. That on a partial presentation of the foregoing facts to Judge J. T. Dickerson, an order was made on the 15th day of August, 1906, directing the plaintiff, as receiver, to retain counsel and to institute proper proceedings against the defendants as subscribers for the capital stock of the said Citizens Bank & Trust Company to recover the respective amounts remaining unpaid on said subscriptions, or for the stock issued to them, for the benefit of all the creditors of the Citizens Bank & Trust Company; that this suit is filed in compliance with said order; that the plaintiff has made demand on each of said defendants for the amount due on his subscription, or for the stock of said Citizens Bank and Trust Company issued to him; that they have each failed, neglected and refused to pay the same or any part thereof; that there is now due the plaintiff as receiver of the Citizens Bank and Trust Company as unpaid subscription for capital stock issued

them, namely; M. W. Krause, three thousand dollars; W. H. Dill, two thousand dollars; H. G. Malot, two thousand dollars; Sam Ward, one thousand dollars; J. E. Guier, three thousand dollars; together with interest thereon from the 14th day of March, 1905. 4. That the plaintiff has no adequate remedy at law and unless this court takes jurisdiction of this suit in equity he will be driven to a multiplicity of actions in trying to enforce the liability of
101 said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions. Wherefore, the plaintiff prays the decree of this court in his favor as receiver against M. W. Krause for three thousand dollars, and interest; against H. G. Malot for two thousand dollars and interest; against W. H. Dill for two thousand dollars and interest; against J. E. Guier for three thousand dollars and interest; and for such other and further relief as to the court may seem just and proper." To this complaint defendant W. H. Dill filed a demurrer, upon the grounds, (1) That said complaint does not state any sufficient facts to authorize a court of equity to assume jurisdiction; (2) That said complaint shows upon its face that complainant has a complete, adequate remedy at law; (3) That this defendant is entitled to a trial by jury under the law and constitution of the United States, of which he would be deprived should this cause be tried in equity; (4) For the reason that said court has no jurisdiction in equity to hear and determine the said cause.

This demurrer was overruled by the court, to which ruling the defendant Dill duly excepted. After statehood the cause was transferred from the district court for Okmulgee county to the district court for Okfuskee County, and the defendant Dill was given thirty days within which to file his answer. The answer of Dill amounted to an admission that he subscribed to the stock, and an averment that he had paid for the same. Mr. Dill seems to be the only defendant to file any pleadings, although the record shows that
102 defendant Malot appeared at the trial in person and by counsel. Upon trial the court found in favor of the defendant Malot and against the defendant Dill, and entered a decree dismissing the cause against Malot, and that the plaintiff W. H. Ebey, as receiver of the Citizens Bank and Trust Company of Stonewall, do have and recover of and from the defendant W. H. Dill, the sum of two thousand dollars, together with interest thereon from the 14th day of March, 1905, and the costs incurred by him in this action. To reverse this judgment this proceeding in error was commenced.

The main contention of counsel for plaintiff in error is that the obligations arising under the facts stated in the complaint are legal and not equitable; that they are based upon the contract of subscription, and each subscription constitutes a separate obligation, that may be dependent upon separate, independent and distinct facts; that the action stated is equitable in form only, being but a bundle of separate actions, each of which grows out of and rests upon an independent and distinct transaction; that the relief prayed for is not

of an equitable nature; that the object and purpose of the action is the recovery of money, and in all such cases, where a money judgment only is prayed for, a court of equity is without jurisdiction. Counsel base their contentions upon the rule laid down in the case of Tompkins v. Craig et al., 93 Fed. 885, for which they quote as follows: "The bill is demurred to upon the ground of multifariousness, and we think the objection must prevail. The statute does not impose a joint but a several liability upon the defendants, and they have no common interest in the decree asked for by the bill. The plaintiff seeks to support the action upon the ground that
103 such a proceeding will prevent a multiplicity of suits, but this is a reason in form rather than in substance; for, while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant. The liability is legal, and not equitable. It is based upon the stockholder's contract of subscription, an implied term of that contract being the declaration of the statute that a certain contingent liability should follow the subscription. Each contract is a separate obligation, and should be separately enforced. As was pointed out upon the argument by the learned counsel for the defendants, this is not a proceeding to determine how large the assessment should be. For obvious reasons, such an inquiry should be made in equity, and all the stockholders should be parties. But after the rate of assessment has been fixed, and the individual liability of each stockholder has thus been ascertained, the enforcement of such liability is the proper subject of a suit at law, in which the separate right of defendant stockholder are distinctively to be considered. Flash v. Conn., 109 U. S. 380, 3 Sup. Ct. 263." We think the case at bar is somewhat distinguishable from the case above quoted from and from the other cases to the same effect cited by counsel. In those cases the receiver appointed by the court to wind up the affairs of the respective corporations represented the corporations in the suits in which they appeared as parties. In the complaint herein there is an allegation to the effect, that on a showing made to the judge who appointed the receiver that the corporation was entirely insolvent and that
104 there would be no funds arising from the sale of its assets for distribution amongst the stockholders, he directed the receiver to retain counsel and institute proper proceedings against the defendants as subscribers of the capital stock of said Citizens Bank & Trust Company, to recover the respective amounts remaining unpaid on said subscription or for the stock issued to them, for the benefit of all the creditors of the Citizens Bank & Trust Company, and that this suit was filed in compliance with said order. It seems to us the foregoing allegation brings the instant case within the rule laid down in Fletcher, et al. v. Bank of Lonoke, et al., 71 Ark. 1, 69 S. W. That was an action commenced by the receiver and other creditors for the use of German National Bank and certain other creditors of the Bank of Lonoke, against the latter bank, C. W. England and other stockholders thereof, to recover so much of the stock

of such shareholders as remained unpaid. Battle, J., in discussing the jurisdictional question raised, says: "The authority of the receiver to bring the action is not shown. We shall treat it as brought by creditors." And on that ground sustained the jurisdiction of the court. Counsel for plaintiff in error, in distinguishing the Arkansas case from the case at bar, quoted the foregoing state- by the Judge who delivered the opinion for the court, and say: "Upon the theory that the suit was by the creditors of the bank, of course, equity had jurisdiction." These cases seem to be similar in principle at least. The Arkansas suit was instituted for the use of the German National Bank and certain other creditors of the Bank of Lonoke, and this, by positive direction of the court, was com-
105 menced by the receiver for the benefit of all the creditors of the Citizens Bank & Trust Company, the insolvent corporation, after it was made to appear that the assets of the bank were entirely inadequate to pay the creditors. In Lanigan v. North, 69 Ark. 62, it was held that a liability created against the stockholders of a banking corporation May be enforced by a creditor in the courts of that State at law as well as in equity, and this notwithstanding it was held that, "the statute definitely fixes the proportion of each debt or claim for which the stockholder is liable." As the laws of Arkansas were in force in the Indian Territory at the time the obligation herein was incurred and this suit commenced, the decisions of the supreme Court of that state although rendered after said laws were put in force in said territory, are entitled to great weight. The case of Cook, et al. v. Carpenter, et al., 212 Pa. 165, was a suit in equity by Cook as assignee of an insolvent corporation, against various stockholders to recover unpaid subscriptions to the capital stock. As in this case the jurisdiction of a court of equity to determine such a cause was raised. Mr. Chief Justice Mitchell, who delivered the opinion of the court, in discussing this proposition, says: "The preliminary question is the jurisdiction in equity. Appellants insist that there is a plain, full, and adequate remedy at law, by suits against the several stockholders defendant, where each can — defendant upon his own case, untrammeled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable, but it is a full and adequate remedy in the sense that it bars the jurisdiction of equity? The subject of the controversy is the collection and administration of cor-
106 porate assets as a trust fund for the benefit of corporate creditors. Both the control of corporate matters and trust funds are in general the subject of equitable jurisdiction. As was said in Lane's Appeal, 105 Pac. 49, 65, 51 Am. Rep. 166: 'When insolvency and exhaustion of assets (of corporations) exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceeding originates in the name of one, or of several, or of all the creditors, the result is the same in each. The capital, when recovered, inures to the benefit of all, and must be distributed among all ratably.' This

result as to collection, and still more forcibly as to distribution, is not reasonably practicable, except in equity. A bill may be filed, as in this case, by assignees representing the corporation for the benefit of creditors, or, as in Lane's Appeal, supra, by creditors in their own names in behalf of themselves and others. In the latter case an action at law would present insuperable difficulties, and yet the substantial controversy is the same, and the mere difference in the nominal complainant should not oust in one case the jurisdiction that must be sustained in the other.

"It is earnest- argued by appellants that in all the cases where a bill has been sustained an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground alone, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true that the necessity for an account is a large and influential element in equitable relief; but we do not find it said in any
107 of the cases that its presence or absence is the conclusive jurisdictional fact. In the present case the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the averments and thus made the necessity of an accounting and assessment an issue; that would at once have made the case one cognizable in equity. Citizens & M. Sav. Bank & T. Co. v. Gillespie, 115 Pa. 564, 9 Atl. 73, was an action at law in which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for payment of debts, or only part, and, if so, how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees some stockholders defendant might have to pay their subscriptions in full while some paid only part, and others perhaps nothing at all. This would be incurring certain inconvenience and quite probable injustice, where the relief should not only be certain, but uniform. As was well said by the learned judge before: 'There are more than forty defendants. Most of them live within the jurisdiction; some do not; and it is quite conceivable that there might be hundreds living without the jurisdiction, not reachable by our process at law. The question involved in all the cases is substantially the same, namely, Ought the corporation to collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any. If, on the other hand, it should be collected, then none should
108 escape.'

"In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable in common law forms. When later the legislature granted equitable powers, it was held that, if the subject of a bill was one within the proper and established jurisdiction of chancery, the invention of a new remedy in common law, form, or the extension of an old one, would not necessarily oust the equitable jurisdiction. Wesley Church v.

Moore, 10 Pa. 273. The question in such cases turns on the completeness, adequacy, and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements. Kirkpatrick v. M'Donald, 11 Pa. 387; Bierbower's Appeal, 107 Pa. 14; Brush Electric Co.'s Appeal, 114 Pa. 574, 7 Atl. 794; Johnston v. Price, 172 Pa. 427, 33 Atl. 688; Gray v. Citizens' Gas. Co. 206 Pa. 303, 55 Atl. 988. In the last case it was said by our Brother Dean: 'The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has; but whether, in view of the facts, it is an adequate one. It may be conceded that the time is not very remote in our judicial history, when a wronged party sought the intervention of equity, and he could be truthfully met by the reply, 'You have a remedy at law in an action for damages:' such reply would have been the end of his bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction; courts now go further, and inquire whether, under the facts, the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequately to right the wrong complained of.' Testing by this standard the numerous actions that would be required at law, and comparing that remedy with the superior certainty, uniformity,
109 and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction."

All the other errors assigned by counsel for plaintiffs in error hinge upon the ruling of the court upon the foregoing, except the assignment that the judgment is not supported by the evidence. We have examined the record very carefully, and are of the opinion that there was sufficient competent evidence introduced at the trial to support the finding of the court below. The Judgment of the court below is affirmed.

Dunn, C. J., Williams, Hayes, and Turner, J. J., concur.

110 In the Supreme Court of the State of Olahoma.

W. H. DILL, Plaintiff in Error,
vs.
W. H. EBEY, Receiver, Defendant in Error.

Petition for Rehearing.

The plaintiff in error respectfully requests a rehearing in the above entitled cause and as grounds therefor alleges that the decision of the Court as rendered and filed on the 10th day of May 1910 is in conflict with the Constitution and laws of the State of Oklahoma and with the seventh Amendment to the Constitution of the United States, in this; that the cause of action in this case arose in the Indian Territory prior to the admission of Oklahoma as a state; that it is an action to recovee money for the unpaid subscription for shares of stock in a corporation organized under the laws of the Indian Territory; that the action was brought in the United States

Court having jurisdiction in the Indian Territory and was there pending undisposed of at the time the State was admitted into the Union; that all the provisions of the Constitution of the United States was applicable to and in force in the Indian Territory at the time this cause of action arose and at the time that the action was instituted; that by the terms of the Seventh Amendment to the Constitution of the United States it is provided that "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried to a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law"; that the cause of action in this cause is one at common law for the recovery of money only and is triable by jury at the common law, and the decision of the court in this cause deprives the plaintiff in error of the
111 right to trial by jury and is in contravention of his rights under the Constitution of the United States; that by the transfer of said cause into the state court for trial all his rights were preserved and no forms of procedure can be invoked to deprive him of his right to trial by jury; that the decision is contrary to and in conflict with the controlling decision of Hale vs. Allison decided by the Supreme Court of the United States, reported in 188 U. S. 56-47 L. ed. 380, in which it is held that in order to give a court of equity jurisdiction in this class of cases there must "be a community of interests in the questions of law and fact involved in the controversy." In this case there was no community of interests in the questions of fact as between any of the parties. Each defendant had executed an independent and several subscription. Each had made a separate and distinct defence. Each made a different and distinct issue and the case of each and every defendant presented a separate and independent issue which had to be tried as a separate cause. The pleading was multifarious and a court of equity was without jurisdiction. If the court was exercising a blended jurisdiction then it committed reversible error in denying a jury trial to the plaintiff in error.

The rule in Hale vs. Allison is followed by the Federal courts and this case arose under Federal jurisdiction and is entitled to be tried by the law and practice as interpreted by the Federal Courts.

The case Hackett et al. vs. Northern Pac. Ry. Co. 140 Fed. 117 is directly in point and controlling in this case. The case of Wyman vs. Bowman 257 make the distinction between the case at bar and one where the community of interest among the defendants is identical upon every question of law and fact presented by the controversy. The right to proceed in equity to recover unpaid stock subscriptions is only allowed in causes where there are unpaid assessments on all the stock, or where the stock has been payable
112 in installments and only a portion of the installments have been paid or as in the Pennsylvania cases cited in the opinion of the Court, where creditors of the corporation in order to reach the assets of the corporation must resort to equity in order to reach the unpaid balances due from stockholders upon stock subscriptions. That there is a plain and ample remedy at law in this case cannot be

questioned. The court sustains the judgment only upon the ground that the remedy by an action at law was not "adequate". The record in this case is a complete answer to the holding of the court. Equity furnished no relief to the plaintiff which an action at law would not have furnished him yet the defendant has been denied a substantial right by this procedure.

This plaintiff sued four defendants in one action, each upon his own separate individual contract of subscription each defendant answered separately and set up a distinct and separate defense; the case has been tried as to two of the defendants, Malott and Dill; the evidence as to the subscription or liability of one has no relevancy as to the rights or liability of the other. The court found Dill liable and found Malott not liable. The cause has not been tried as to the other two defendants and when trial is had it must be upon separate and distinct issuers as to each. Equity has not furnished any more adequate relief than could have been obtained at law. The results conclusively show that the trial court erred in holding that the case was one of equitable cognizance. The Pennsylvania cases quoted from and relied upon by the court are clearly distinguishable both upon the facts and upon principle. In one of those cases the plaintiff was an assignee for the benefit of creditors and brought his action in equity to recover upon unpaid subscriptions of stockholders. There was no question as to the individual liability. Either all the stockholders were liable for the unpaid balances on stock or none were liable, the community of interest among the defendants
113 upon every question of law and facts presented by the issues was identical thus bringing the case within the rule of Hale vs. Allison, supra. In the other case cited from Pennsylvania the creditors were plaintiffs and proceeded in equity to reach the debts due the corporation. They could not proceed at law and a court of Chancery was the only forum which could afford relief.

In the case at bar the Receiver is a Receiver for the corporation and not for the creditors. He, by virtue of his office, may carry on the business of the corporation, marshal its assets, sue for the corporation and collect its choses in action and securities, enforce payment of its obligations due it and of its unpaid stock subscriptions and pay its debts and liabilities. He only represents the creditors to the extent of marshalling the assets and conserving the property of the corporation for the purpose of liquidating claims. The court in its opinion quotes the order of court which appointed the receiver and relies upon this order to some extent in giving support to the holding that the case is a proceeding by the creditors of the insolvent bank. We desire to remind the court tha- the court which appointed the receiver had no power to confer upon him the authority to bring or prosecute any particular kind of proceeding or to determine the jurisdiction of the court in which an action should be brought by him. That court could not empower him to sue in any particular court or to bring any particular character of action. It might direct him to sue or defend in certain actions but no order made by that court can have any force or weight in determining the question of the jurisdiction in this court or the right

of the Receiver to wage a suit in equity rather than an action at law. These questions must be determined upon the facts alleged to constitute the liability of the defendants and the law applicable to such liability.

An assignee for the benefit of creditors takes title to the property in trust for the creditors by virtue of the deed of assign-
114 ment executed by the corporation. The entire interest of the corporation passes to the creditors by the deed of assignment. The assignee takes the title in trust for the creditors and the creditors through him enforce their rights. A receiver is an officer of the court, an arm of the court. The property is in custodia legis, held by the court for the corporation. The court directs and manages the corporation through the receiver but the title is at all times in the corporation. The receiver acts for and as the board of Directors and officers, he sues for the corporation and the creditors derive only such benefit from such acting as the law gives them in the assets available for payment of debts after paying court expenses. The law and the courts have always made these distinguished and thay would be considered in the determination of this cause.

The right to proceed in equity is by this court put upon the ground of the inadequacy of the remedy at law; that equity will intervene to avoid a multiplicity of suits at *alw*. We do not believe that a case can be found in the books where the courts have held that four law suits against four separate defendants have been held to come within that vague and uncertain term, "multiplicity of law suits." In our brief we cited the able, instructive and comprehensive opinion of the Supreme Court of the United States in Hale vs. Allison, 188 U. S. 56, This case is neither discussed or referred to in the opinion of the court. In as much as that court is the highest in the land and its opinions entitled to great weight and grave consideration, and in as much as this case arose before Statehood and the rights of the defendant are dependent upon rights secured to him by the Constitution of the United States and its laws and that his cause may if the parties so elect go to said court for final review, we believe that we are entitled to have the court review the case of Hale vs. Allison and follow it in this case.

The statement of Mr. Justice Peckham shows that one of
115 the two questions there considered and passed upon is identical with the case at bar and in the discussion of the second proposition in that cause beginning on page 71 of the official volume and page 390 of the Lawyers Ed. the court covers fully every point in this case; the order of the court appointing the receiver and its effect, the finding of the court that appointed the receiver that the corporation was insolvent; the necessity of collecting the entire stock subscriptions; the right to sue forty seven subscribers, all residents of one state, in one action—are each discussed and the law fully reviewed and a conclusion reached directly contrary to that reached by the court in this case. This decision which we think is controlling has been entirely overlooked by the court, and for this reason alone we submit that we are entitled to a rehearing.

The rule is stated in clear and positive terms in Hale vs. Allison that "Where the whole amount is sought to be recovered the proceeding must be at law, where less is required the proceeding may be in equity." Let this rule prevail and the proceedings in this case are wrong. The four defendants are sued for the entire amount of their stock subscriptions—the par value of their stock—upon the acerment that neither of them had ever paid anything for their stock. This court does not pass upon or decide this question.

The rule announced in Hale vs. Allison supra is sustained in

Kennedy vs. Gibson 8 Wall. 498.
United States vs. Knox, 102 U. S. 422.
Bailey vs. Tillinghast, 99 Fed. 801.
Hale vs. Allison, (Dist. Ct.) 102 Fed. 790.
Tompkins vs. Craig et al. 93 Fed. 885.
Casey vs. Galli, 94 U. S. 673.
Auer vs. Lombard, 72 Fed. 211.
Hale vs. Hardon, 89 Fed. 286.

The Court in its opinion holds the evidence sufficient to
116 support the judgment. Upon this question we earnestly but respectfully urge a review of the issues and the evidence in the case. We confidently assert that there is no evidence to warrant the finding of the trial court.

The plaintiff alleges that the defendant Dill had subscribed for 80 shares of stock and that he was indebted to the Bank in the sum of $2000.00 for said stock. Dill denied tha- he was indebted upon his subscription. This was the issue. The subscription was in writing and undenied. Payment would ordinarily be presumed. The plaintiff in order to recover was bound to show an indebtedness by the fair preponderance of the evidence. Upon this issue he had the burden. To fail to make the proof entitled the defendant to a finding in his favor. Upon this state of the record the trial was had. The only evidence submitted by the plaintiff was that of the expert Timberlake, a banker, who had examined the books of the Stonewall bank. He testified that the Stonewall bank started with $10000.00 paid up capital stock and that the books showed that the Stonewall bank had $10000.00 to its credit in the Citizens Bank and Trust Co. of Okemah (Record p. 21). This shows a a payment of all the stock that had been subscribed including the $"000.00 subscribed by Dill. He further testified that the stock books showed that Dill owned $2000.00 of the stock and that $2000.00 was debited to the Citizens Bank and Trust Co. of Okemah. This also was specific proof of payment by Dill. If there is any liability unpaid it is the Okemah bank which must account for this $2000.00 A deposit of $2000.00 in the Okemah Bank by Dill to the credit of the Stonewall Bank constitutes a valid payment and this was done as was afterward shown by the cashier of the Okemah Bank. Timberlake also swore (Record p. 21) that the books of the Stonewall bank showed $1000.00 in the Okemah Bank for the use of the Stonewall Bank. He testified to a number of transactions between the two banks. When asked about the disposition of the $1000.00 credit

in the Okemah Bank he stated (Record p. 22) that the small
117 books of the Stonewall Bank show that checks were drawn on the Okemah Bank which were not on the Draft register and that the books at that date showed an indebtedness by the Okemah bank to the Stonewall Bank of $89.91. This balance was all that remained of the $10000.00 deposit including the other transactions. On page 23 of the record it is shown that Timberlake testified that the books of the Stonewall bank showed a charge of $2000.00 against W. H. Dill for stock and that this was paid into the Okemah Bank on March 14 1905. He also testified that funds were withdrawn from the Okemah Bank by the Stonewall Bank "By wire, 'phone and advise" and that funds were transferred from the Okemah Bank to the Stonewall Bank "by letter, 'phone and advice" and same was "proper". Now how could the trial court or how can this court say that Dill is indebted upon his stock subscription. Timberlake does not pretend to say what checks were drawn or what money was transferred by letter 'phone or advise. Evidently some money was transferred between the banks in those ways for he testified to the fact that these were the way that money was transferred between the banks, yet he does not pretend to say what the amounts of these various transactions were although he does give the balance due. We submit that there is no ground for a shadow of inference let alone proof of substantial facts, to show an indebtedness up-n Dill's part.

The defendant introduced M. B. Flesher, cashier of the Citizens Bank and Trust Co. of Okemah. He testified (Record p. 29) that W. H. Dill drew his check on March 13 1905 on the Okemah Bank in favor of the Stonewall Bank for $2000.00 and the check was in the record. That said Check was paid on same date. That on the same date the Okemah Bank gave the Stonewall Bank credit for the item of $2000.00 represented by Dill's Check. (P. 30) On the same date Dill's account was charged on the books of the Okemah Bank with $2000.00. He also testified that the books of the Stonewall Bank show that the same Item was charged against the Bank at Okemah.

118 These transactions show conclusively that Dill paid for his stock by depositing in the bank of Okemah the $2000.00 to the credit of the Stonewall Bank. That the Stonewall Bank took credit for the same item and that this amount went into its account at the bank. Dill's check for $2000.00 was paid and that amount deducted from his account at the Okemah Bank.

No more conclusive proof of payment could be made. The books of the Banks show the same transaction and corroborate each other. If the money was lost Dill was not a party to it and if there was any shuffling of accounts the Bank and not Dill is liable. If the Bank at Stonewall did not get Dill's money the Bank at Okemah should account for it. There is however no shadow of proof that the Stonewall bank did not get the money. Its books so far as introduced show only a small balance against the Okemah bank tending to show that it did get the money if anything. The plaintiff pretends to rely upon the draft register not showing a full withdrawal of all the money while he at no place attempts to account for checks or the

other methods of withdrawing money which his own expert testified was carried on and was "proper."

We insist upon a further careful review of this evidence. A great injustice is being done. $2000.00 with interest for five years is a large item and this matter should not be passed over lightly by the court ar decided upon the theory advanced by the trial court that the defendants attorneys did not produce the witnesses that the court thought he should have produced. The burden was not on the defendant and we contend that *eh* might safely have rested without any proof on his part and been entitled to judgment. The Court says the evidence is sufficient. We insist in good faith that we cannot find such evidence in the record. We think that we have a right to *ahve* the court point out the evidence that it says is sufficient to support the judgment. If the court says that by failure to
119 make proof the Receiver is entitled to recover then there would be support for the conclusion. We contend that this is a law case and that the authorities cited by us support our contention. We insist that we are entitled to a jury trial and that the laws of Congress and the Constitution of the United States guarantee us this right of which the court has deprived us. We insist that there is no testimony to support the averment that Dill has never paid for his stock but on the contrary that the testimony submitted by the Receiver shows conclusively that he did pay for it. The record abundantly supports us upon both of these contentions. We submit this motion with the greatest respect believing that the court in the multiplicity of its duties and multifariousness of its investigations has become confused in the mass of figures and transactions sworn to and has overlooked the controlling points both as to law and fact in this case. For these reasons we earnestly pray a reconsideration and rehearing.

Respectfully submitted.

BURFORD & BURFORD,
C. T. HUDDLESTON,
Attorneys for Plaintiff in Error.

Endorsed on back: #381. W. H. Dill, vs. W. H. Eby, Receiver, Petition for Rehearing. Filed May 23 1910 W. H. L. Campbell, Clerk, Burford & Burford, for Plaintiffs in error.

120 And thereafter, to-wit: on the 24th day of May 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court Proceedings.

381.

W. H. DILL et al., Plaintiffs in Error,
vs.
W. H. EBEY, Receiver, Defendant in Error.

And now on this 24th day of May 1910, it is ordered by the court that the mandate of this court in the above cause, be, and the same is hereby stayed until further order of the court.

121 Thereafter, to-wit: on the 16th day of November 1910, in the Supreme Court, of Oklahoma, the following proceedings were had in said cause:

Supreme Court, November Term, 1910, November 16th, 1910, Third Judicial Day.

381.

W. H. DILL et al., Plaintiffs in Error,
vs.
W. H. EBEY, Receiver, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having duly considered the same and being fully advised in the premises, finds: that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause, be, and the same is hereby affirmed.

(The former opinion withdrawn and supplemented and as supplemented refiled; whereupon the petition for rehearing is denied.)

Opinion by Kane, J.

All the Justices concur.

122 In the Supreme Court of the State of Oklahoma.

No. 381.

W. H. DILL et al., Plaintiffs in Error,
vs.
W. H. EBEY, Receiver of the Citizens Bank and Trust Company of Stonewall, Defendant in Error.

(Filed 10th day of May, 1910.)

1. A complaint in a suit in equity wherein E. as receiver of an insolvent bank, joins certain subscribers to the capital stock of the

bank as defendants, for the purpose of recovering unpaid subscriptions, that further alleges, in substance, that the judge of the court wherein said receiver was appointed, upon application of creditors, supported by a showing that the bank was entirely insolvent and without assets sufficient to distribute any part thereof to the bank or its shareholders, entered an order directing said receiver to retain counsel and institute proper proceedings against the defendants as subscribers for the capital stock of said insolvent bank to recover the respective amounts remaining unpaid on said subscriptions, or for the stock issued to them, for the benefit of all the creditors of said bank, and that this suit is filed in compliance with said order, states facts sufficient to warrant the trial court to treat such suit as one brought by the creditors of said insolvent bank over which a court of equity has jurisdiction and in which all the subscribers to the capital stock may be joined as defendants.

2. Under such circumstances the right to maintain suit against the individual stockholders of an insolvent corporation to enforce their liability on unpaid stock subscriptions does not constitute such a plain, full, adequate remedy at law as to defeat a suit in equity against all stockholders for the collection and administration of the corporate assets as a trust fund for the benefit of the creditors.

(Syllabus by the Court.)

Error from the District Court of Okfuskee County.

Before John Caruthers, Judge.

Affirmed.

123 John H. Burford and C. T. Huddleston, attorneys for plaintiff in error.

Clinton A. Galbraith, Tom D. McKeown, and W. W. Witten, attorneys for defendant in error.

Opinion of the Court by

KANE, *J.*:

This suit was filed prior to statehood, in the United States Court for the western district of the Indian Territory, sitting at Okmulgee, on the equity side of the docket, by the defendant in error, W. H. Ebey, as receiver of the Citizens Bank and Trust Company of Stonewall, as plaintiff, against the plaintiffs in error, M. W. Krouse, W. H. Dill, H. G. Malot, J. E. Guier and Sam Ward, as defendant-. The Complaint omitting the caption, is in words and figures as follows:

"Comes now the said plaintiff and represents that he is the duly appointed, qualified receiver of the Citizens Bank & Trust Company of Stonewall, Indian Territory, a corporation, organized under the laws of the Indian Territory and engaged in business at Stonewall prior to the time of the appointment of the plaintiff as its receiver, and that the defendants W. H. Dill and H. G. Malot, are citizens of the western district of the Indian Territory, and reside nearer to Okmulgee than any other place of holding court in said district,

and for cause of action the plaintiff avers: 1. That heretofore, to-wit, on or about the 14th day of March, 1905, the said defendants, M. W. Krause, J. E. Guier, W. H. Dill and Sam Ward as corporators, organized the Citizens Bank & Trust Company for the purpose of transacting a general banking and trust business at Stone-
124 wall in the Indian Territory; that M. W. Krause was elected president, and W. H. Dill was elected vice-president and J. E. Guier was elected cashier of said corporation; that said officers together with Sam Ward constituted the first board of directors of said Citizens Bank & Trust Company, and the articles of incorporation and certificate required by law were filed with the clerk of the United States court of appeals for the Indian Territory, at South McAlester, on the 13th day of February, 1905; that the objects and purposes of said corporation were set out in detail in the certificate filed as aforesaid, and said certificate also recites that the capital stock of said Citizens Bank & Trust Company is and was twenty-five thousand dollars ($25,000), divided into shares of twenty-five dollars each, and that ten thousand dollars of said capital stock had been actually paid in by the subscribers and that the names of the stockholders and the number of shares subscribed for by them are as follows: M. W. Krause, president, 120 shares; W. H. Dill, 80 shares; J. E. Guier, 160 shares; and Sam Ward 40 shares; that on the said 14th day of March, 1905, as the plaintiff is advised and believes, and on such information and belief, alleges the fact to be, H. G. Malot subscribed for 80 shares of the capital stock of the Citizens Bank & Trust Company, taking 40 shares of the 160 shares subscribed for by J. E. Guier, and 40 shares of the 120 subscribed for by M. W. Krause; that on the said 14th day of March, 1905, there was issued certificate number 1 to M. W. Krause for 80 shares of the capital stock of the said Citizens Bank & Trust Company; that on the same day certificate number 3 for 80 shares of the capital stock of the said Citizens Bank & Trust company was issued
125 to W. H. Dill; that on the same day certificate number 5 for 80 shares of the capital stock of said Citizens Bank & Trust Company was issued to H. G. Malot; that on the same day certificate number 4 for 120 shares of the capital stock of the said Citizens Bank & Trust Company was issued to J. E. Guier; that on the same day certificate number 6 for 40 shares of the capital stock of the said Citizens Bank & Trust Company was issued to Sam Ward; that each of the said defendants undertook and agreed to pay the said Citizens Bank and Trust Company the par value of the respective shares of stock issued to them, namely: That M. W. Krause undertook and agreed to pay to the Citizens Bank & Trust Company for the 120 shares of stock issued to him, the sum of three thousand dollars; that H. G. Malot undertook and agreed to pay the par value of the 80 shares of stock issued to him, towit, two thousand dollars; that W. H. Dill undertook and agreed to pay said Citizens Bank & Trust Company the par value of the 80 shares of stock issued to him, towit, two thousand dollars; that Sam Ward undertook and agreed to pay said Citizens Bank & Trust Company the par value of the 40 shares of stock issued to him, towit, one thousand

dollars; that J. E. Guier undertook and agreed to pay said Citizens — and Trust Company the par value of the 120 shares of stock issued to him, towit, three thousand dollars. That plaintiff is advised and believes and on such information and belief, alleges the facts to be that the only one of said defendants who paid any part of the par value of said stock or anything of value for the stock subscribed for and issued to them, was the defendant M. W. Krause,
126 who paid to said Citizens Bank & Trust Company the sum of two thousand dollars; and that after said sum had been paid the same was later returned to said defendant; and, as plaintiff is informed and believes, and on such information and belief alleges, the fact to be, the said defendants organized said Citizens Bank & Trust Company without any purpose or intent to pay for its capital stock or any part thereof, except the two thousand dollars paid in by the defendant, Krause, and that this sum was paid in with the distinct understanding that it should be returned after the corporation came to be a going concern, the sworn statement in the certificate of incorporation that ten thousand dollars had been actually paid in to the contrary notwithstanding. 2. That the said Citizens Bank and Trust Company was and is insolvent and on the 20th day of February, 1906, on the petition of one of its creditors the plaintiff was appointed by the United States court for the southern district of the Indian Territory, receiver to take charge of all of its property and effects, and to administer the same under the order of said court, for the benefit of all its creditors; that the liabilities of said Citizens Bank & Trust Company at the time the plaintiff took charge of its assets as receiver, as shown by its books, were $15,179.02; that a great deal of the paper of said Citizens Bank and Trust Company is worthless and a very small sum can be realized from the same and the rest of its assets; that after six months' efforts the plaintiff has only been able to collect on notes $60.50, and to realize on other property the sum of $100.00; that all of the capital stock of said Citizens Bank & Trust Company represented as paid in, namely, ten thousand dollars, and the assets in the hands of the
127 plaintiff, as receiver, will not be sufficient to pay to the creditors of said Citizens Bank & Trust Company. 3. That on a partial presentation of the foregoing facts to Judge J. T. Dickerson, an order was made on the 15th day of August, 1906, directing the plaintiff, as receiver, to retain counsel and to institute proper proceedings against the defendants as subscribers for the capital stock of the said Citizens Bank & Trust Company to recover the respective amounts remaining unpaid on said subscriptions, or for the stock issued to them, for the benefit of all the creditors of the Citizens Bank & Trust Company; that this suit is filed in compliance with said order; that the plaintiff has made demand on each of said defendants for the amount due on his subscription, or for the stock of said Citizens Bank and Trust Company issued to him; that they have each failed, neglected and refused to pay the same or any part thereof; that there is now due the plaintiff as receiver of the Citizens Bank and Trust Company as unpaid subscription for Capital stock issued to them, namely: M. W. Krause, three thousand dol-

lars; W. H. Dill, two thousand dollars; H. G. Malot, two thousand dollars; Sam Ward, one thousand dollars; J. E. Guier, three thousand dollars, together with interest thereon from the 14th day of March, 1905. 4. That the plaintiff has no adequate remedy at law and unless this court takes jurisdiction of this suit in equity he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such action. Wherefore, the plaintiff prays the decree of this court in his favor as receiver against M. W. Krause for three thousand dollars, and interest; against H.
128 G. Malot for two thousand dollars and interest; against W. H. Dill for two thousand dollars and interest; against J. E. Guier for three thousand dollars and interest; and for such other and further relief as to the court may seem just and proper." To this complaint defendant W. H. Dill filed a demurrer, upon the grounds, (1) That said complaint does not state any sufficient facts to authorize a court of equity to assume jurisdiction; (2) That said complaint shows upon its face that complainant has a complete, adequate remedy at law; (3) That this defendant is entitled to a trial by jury under the law and constitution of the United States, of which he would be deprived should this cause be tried in equity; (4) For the reason that said court has no jurisdiciton in equity to hear and determine the said cause.

This demurrer was overruled by the court, to which ruling the defendant Dill duly excepted. After statehood the cause was transferred from the district court for Okmulgee county to the district court for Okfuskee county, and the defendant Dill was given thirty days within which to file his answer. The answer of Dill amounted to an admission that he subscribed to the stock, and an averment that he had paid for the same. Mr. Dill seems to be the only defendant to file any pleadings, although the record shows that defendant Malot appeared at the trial in person and by counsel. Upon trial the court found in favor of the defendant Malot and against the defendant Dill, and entered a decree dismissing the cause against Malot, and that the plaintiff W. H. Ebey, as receiver of the Citizens Bank and Trust Company of Stonewall, do have and recover of and from the defendant W. H. Dill, the sum of two thousand dollars, together with interest thereon from the 14th day of March,
129 1905, and the costs incurred by him in this action. To reverse this judgment this proceeding in error was commenced.

The main contention of counsel for plaintiff in error is that the obligations arising under the facts stated in the complaint are legal and not equitable; that they are based upon the contract of subscription and each subscription constitutes a separate obligation, that may be dependent upon separate, independent and distinct facts; that the action stated is equitable in form only, being but a bundle of separate actions, each of which grows out of and rests upon an independent and distinct transaction; that the relief prayed for is not of an equitable nature; that the object and purpose of the action is the recovery of money, and in all such cases, where a money judg-

ment only is prayed for, a court of equity is without jurisdiction. Counsel base their contentions upon the rule laid down in the case of Tompkins v. Craig, et al., 93 Fed. 885, from which they quote as follows: 'The bill is demurred to upon the ground of multifariousness, and we think the objection must prevail. The statute does not impose a joint but a several liability upon the defendants, and they have no common interest in the decree asked for by the bill. The plaintiff seeks to support the action upon the ground that such a proceeding will prevent a multiplicity of suits, but this is a reason in form rather than in substance; for, while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the
130 separate and distinct liability of one defendant. The liability is legal, and not equitable. It is based upon the stockholder's contract of subscription, an implied term of that contract being the declaration of the statute that a certain contingent liability should follow the subscription. Each contract is a separate obligation, and should be separately enforced. As was pointed out upon the argument by the learned counsel for the defendants, this is not a proceeding to determine how large the assessment should be. For obvious reasons, such an inquiry should be made in equity, and all the stockholders should be parties. But after the rate of assessment has been fixed, and the individual liability of each stockholder has thus been ascertained, the enforcement of such liability is the proper subject of a suit at law, in which the separate rights of the defendant stockholder are distinctively to be considered. Flash v. Conn., 109 U. S. 380, 3 Sup. Ct. 263." We think the case at bar is somewhat distinguishable from the case above quoted from and from the other cases to the same effect cited by counsel. In those cases the receiver appointed by the court to wind up the affairs of the respective corporations represented the corporations in the suits in which they appeared as parties. In the complaint herein there is an allegation to the effect, that on a showing made to the judge who appointed the receiver that the corporation was entirely insolvent and that there would be no funds arising from the sale of its assets for distribution amongst the stockholders, he directed the receiver to retain counsel and institute proper proceedings against the defendants as subscribers of the capital stock of said Citizens Bank & Trust Company, to recover the respective amounts remaining unpaid on said subscription or for the stock
131 issued to them, for the benefit of all the creditors of the Citizens Bank & Trust Company, and that this suit was filed in compliance with said order. It seems to us the foregoing allegation brings the instant case within the rule laid down in Fletcher, et al. v. Bank of Lonoke, et al., 71 Ark. 1, 69 S. W. That was an action commenced by the receiver and other creditors for the use of the German National Bank and certain other creditors of the Bank of Lonoke, against the latter bank, C. W. England and other stockholders thereof, to recover so much of the stock of such shareholders as remained unpaid. Battle, J., in discussing the

jurisdictional question raised, says: "The authority of the receiver to bring the action is not shown. We shall treat it as brought by creditors." And on that ground sustained the jurisdiction of the court. Counsel for plaintiff in error, in distinguishing the Arkansas case from the case at bar, quoted the foregoing statement by the Judge who delivered the opinion for the court, and says "Upon the theory that the suit was by the creditors of the bank, of course equity had jurisdiction." These cases seem to be similar in principle at least. The Arkansas suit was instituted for the use of the German National Bank and certain other creditors of the Bank of Lonoke, and this, by positive direction of the court, was commenced by the receiver for the benefit of all the creditors of the Citizens Bank & Trust Company, the insolvent corporation, after it was made to appear that the assets of the bank were entirely inadequate to pay the creditors. In Lanigan v. North, 69 Ark. 62, it was held that a liability created against the stockholders of a banking corporation may be enforced by a creditor in the courts of that state at law as well as in equity, and this notwithstanding
132 it was held that, "the statute definitely fixes the proportion of each debt or claim for which the stockholder is liable." As the laws of Arkansas were in force in the Indian Territory at the time the obligation herein was incurred and this suit commenced, the decisions of the supreme court of that state although rendered after said laws were put in force in said territory, are entitled to great weight. The case of Cook, et al. v. Carpenter, et al., 212 Pa. 165, was a suit in equity by Cook as assignee of an insolvent corporation, against various stockholders to recover unpaid subscriptions to the capital stock. As in this case the jurisdiction of a court of equity to determine such a cause was raised. Mr. Chief Justice Mitchell, who delivered the opinion of the court, in discussing this proposition, says: "The preliminary question is the jurisdiction in equity. Appellants insist that there is a plain, full, and adequate remedy at law, by suits against the several stockholders defendant, where each can — defendant upon his own case, untrammeled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable, but is it a full and adequate remedy in the sense that it bars the jurisdiction of equity? The subject of the controversy is the collection and administration of corporate assets as a trust fund for the benefit of corporate creditors. Both the control of corporate matters and trust funds are in general the subject of equitable jurisdiction. As was said in Lane's Appeal, 105 Pa. 49, 65, 51 Am. Rep. 166: 'When insolvency and exhaustion of assets (of corporations) exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole
133 amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceeding originates in the name of one, or of several, or of all the creditors, the result is the same in each. The capital, when recovered, inures to the benefit of all, and must be distributed among all ratably.' This result as to col-

lection, and still more forcibly as to distribution, is not reasonably practicable, except in equity. A bill may be filed, as in this case, by assignees representing the corporation for the benefit of creditors, or, as in Lane's Appeal, supra, by creditors in their own names in behalf of themselves and others. In the latter case an action at law would present insuperable difficulties, and yet the substantial controversy is the same, and the mere difference in the nominal complaint should not oust in one case the jurisdiction that must be sustained in the other.

"It is earnestly argued by appellants that in all the cases where a bill has been sustained an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground alone, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true that the necessity for an account is a large and influential element in equitable relief; but we do not find it said in any of the cases that its presence or absence is the conclusive jurisdictional fact. In the present case the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the averments and thus made the necessity of an accounting and assessment an issue; that would at once have made the case one cognizable in equity. Citizens & M. Sav. Bank & T. Co. v. Gillespie, 115 Pa. 564, 9 Atl. 73, was an action at law in
134 which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for payment of debts, or only part, and, if so, how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees some stockholders defendant might have to pay their subscriptions in full while some paid only part, and others perhaps nothing at all. This would be incurring certain inconvenience and quite probable injustice, where the relief should not only be certain, but uniform. As was well said by the learned judge before: 'There are more than forty defendants. Most of them live within the jurisdiction; some do not; and it is quite conceivable that there might be hundreds living without the jurisdicton, not reachable by our process at law. The question involved in all the cases is substantially the same, namely, Ought the corporation to collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any. If, on the other hand, it should be collected, then none should escape.'

"In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable in common law forms. When later the legislature granted equitable powers, it was held that, if the subject of a bill was one within the proper and established jurisdiction of chancery, the invention of a new remedy in common law
form, or the extension of an old one, would not necessarily
135 oust the equitable jurisdiction. Wesley Church v. Moore, 10 Pa. 273. The question in such cases turns on the com-

pleteness, adequacy, and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements. Kirkpatrick v. M'Donald, 11 Pa. 387; Bierbower's Appeal, 107 Pa. 14; Brush Electric Co.'s Appeal, 114 Pa. 574, 7 Atl. 794; Johnston v. Price, 172 Pa. 427, 33 Atl. 688; Gray v. Citizens' Gas Co. 206 Pa. 303, 55 Atl. 988. In the last case it was said by our Brother Dean: 'The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has; but whether, in view of the facts, it is an adequate one. It may be conceded that the time is not very remote in our judicial history, when a wronged party sought the intervention of equity, and he could be truthfully met by the reply, 'You have a remedy at law in an action for damages;' such reply would have been the end of his bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction; courts now go further, and inquire whether, under the facts, the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of.' Testing by this standard the numerous actions that would be required at law, and comparing that remedy with the superior certainty, uniformity, and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction." In Hayden v. Thompson, 71 Fed. 60, the right of a receiver of an insolvent national bank to maintain a bill in equity against the shareholders of the bank, collectively, to recover dividends which had been paid in violation of the national banking laws, was upheld. The right to sue in equity was maintained on the
136 ground of avoiding a multiplicity of actions; also, on the ground that the suit was one to redress a fraud and breaches of trust; and generally, because the remedy at law was inadequate. The doctrine is well settled in the federal courts that, in those cases where the right of a court of equity to afford redress for wrongful acts depends upon the inadequacy of the legal remedy, courts of equity may exercise jurisdiction unless the legal remedy is as plain, practical and efficient to the ends of justice and its prompt administration as the remedy in equity. In determniing whether a suitor should be permitted to sue in equity, the federal courts have always attached much importance to the fact that the remedy in the latter forum, as compared with the remedy at law, will save time and expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Cockrill v. Cooper, et al., 86 Fed. 7; Boyce Exrs. v. Grundy, 3 Pet. 210; Oelrich v. Spain, 15 Wall. 211; Preteca v. Land Co., 50 Fed. 674. If the foregoing principles are applied to the case at bar, we think it may be safely asserted that the receiver is entitled to invoke the remedial powers and processes of a court of equity to redress the wrongs of which he complains.

All the other errors assigned by counsel for plaintiffs in error hinge upon the ruling of the court upon the foregoing, except the assignment that the judgment is not supported by the evidence. We have examined the record very carefully, and are of the opinion that there was sufficient competent evidence introduced at the trial

to support the findings of the court below. The judgment of the court below is affirmed.

Dunn, C. J., Williams, Hayes, and Turner, JJ., concur.

137 And thereafter, to-wit: on the 29th day of November, 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, November Term, 1910, November 29th, 1910, Fifth Judicial Day.

#381.

W. H. DILL et al., Plaintiffs in Error,
vs.
W. H. EBEY, Receiver, Defendant in Error.

And now comes counsel for plaintiffs' in error and makes application for an order recalling the mandate in the above entitled cause, and it is ordered by the court that the mandate of this court in the above entitled cause, be, and the same is hereby recalled.

138 SUPREME COURT,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 127 inclusive are a true, full and complete transcript of the record and proceedings, in the case of W. H. Dill et al., Plaintiff, vs. W. H. Ebey, Receiver of the Citizens Bank and Trust Company of Stonewall, Defendant, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Guthrie, Oklahoma, this 22" —, 1910.

[Seal Supreme Court State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk, Supreme Court of Oklahoma.
By W. M. BONNER, *Deputy.*

[Endorsed on cover:] File No. 22,455. Oklahoma Supreme Court. Term No. 191. William H. Dill, plaintiff in error, vs. William H. Ebey, Receiver of The Citizens Bank and Trust Company of Stonewall. Filed December 28th, 1910. File No. 22,455.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1912.

William H. Dill,
Plaintiff in Error.
vs.
William H. Ebey, Receiver of the Citizens Bank and Trust Company of Stonewall.
Defendant in Error.
No. 191.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Brief and Argument for Plaintiff in Error.

STATEMENT OF CASE.

This cause originated in the United States Court for the Western District of Indian Territory, and was commenced on the 17th day of September 1906, to recover from the stockholders in a banking corporation, alleged unpaid subscriptions to the capital stock of the corporation.

The Citizens Bank and Trust Company of Stonewall, Indian Territory, was incorporated under the

laws of Congress in force in the Indian Territory on February 13th, 1905, and began doing a banking business at Stonewall. The capital stock was $25,000.00, divided into 1,000 shares of $25.00 each. In the organization of the corporation, ten thousand dollars of the capital stock was subscribed as follows:

M. W. Krause.....120 Shares.
W. H. Dill,..... 80 Shares.
J. E. Guier .....160 Shares.
Sam Ward ..... 40 Shares.

Subsequent H. G. Malot became the owner of 80 shares.

In February, 1906, the Citizens Bank and Trust Company was, in an action brought against it by the Union National Bank of Kansas City, Missouri, declared insolvent, and the defendant in error was by the Court appointed receiver of its property and effects, and was by said order authorized and empowered to take charge of the lands, tenements, goods, chattels, assets, moneys, credits, choses in action, rights and interest of every kind, name and nature, either in law or in equity, or any part thereof, belonging to said corporation, and to hold the same as provided by the laws in force in the Indian Territory, and until the further order of the Court. Transcript p. 17.

Subsequently upon a showing by the receiver that if all the assets of the bank, including its capital stock were realized upon, there would not be sufficient to pay its liabilities, and the further representation that the subscribers to the capital stock had not paid the amounts severally subscribed by them, the Court ordered the receiver to employ counsel, and "To institute proper proceedings against the defendants as subscribers for the capital stock of the said Citizens Bank and Trust Company to recover the respective amounts remaining unpaid on said subscription, or for the stock, issued to them, for the benefit of all the creditors of the Citizens Bank and Trust Company."

Transcript p. 10.

Pursuant to this authority the receiver instituted this suit in equity against W. W. Krause for $3,000., W. H. Dill for $2,000., H. G. Malott for $2,000., and J. E. Guier for $3,000., with interest on each of said several sums from the 14th day of March, 1905.

The Bill is as follows:

In the United States Court for the Western District of the Indian Territory, Sitting at Okmulgee.

W. H. Ebey, Receiver of Citizens Bank & Trust Company, Plaintiff.

vs.

M. W. Krause, W. H. Dill, H. G. Malot, J. E. Guier, Sam Ward, Defendants.

Complaint in Equity.

Comes now the said plaintiff and represents that he is the duly appointed, qualified receiver of the Citizens Bank & Trust Company of Stonewall, Indian Territory, a corporation organized under the laws of the Indian Territory, and engaged in business at Stonewall prior to the time of the appointment of the plaintiff as its receiver, and that the defendants W. H. Dill and H. G. Malot are Citizens of the Western District of the Indian Territory and reside nearer to Okmulgee than any other place of holding court in said District and for cause of action the plaintiff avers:

1st. That heretofore to-wit, on or about the 14th, day of March 1905, the said defendants M. W. Krause, J. E. Guier, W. H. Dill and Sam Ward as corporators, organized the Citizens Bank & Trust Company for the purpose of transacting a general Banking & Trust Business at Stonewall in the Indian Territory; that M. W. Krause was elected President, and W. H. Dill was elected Vice-President, J. E. Guier was elected cashier of said corporation; that said officers together with Sam Ward constituted the first Board of Directors of said Citizens Bank & Trust Company, and the Articles of incorporation and certificate required by law were filed with the Clerk of the United States Court of appeals for the Indian Territory at South McAlester, on the 13th day of February, 1905; that the objects and purposes of said corporation were set out in detail in the certificate filed as aforesaid, and said certificate also recites that the capital stock of said Citizens Bank & Trust

Company is and was twenty-five thousand dollars ($25000.00) divided into shares of twenty-five dollars each, and that ten thousand dollars of said capital stock had been actually paid in by the subscribers and that the names of the stockholders and the number of shares subscribed for by them are as follows:

M. W. Krause, President, One Hundred twenty (120) shares, W. H. Dill eighty (80) shares, J. E. Guier One Hundred sixty (160) shares, and Sam Ward Forty (40) shares; that on the said 14th, day of March, 1905, as the plaintiff is advised and believes, and on such information and belief, alleges the fact to be, H. G. Malot subscribed for eighty (80) shares of the capital stock of the Citizens Bank & Trust Company, taking Forty (40) shares of the One hundred sixty (160) shares subscribed for by J. E. Guier, and Forty (40) shares of the one hundred twenty (120) shares subscribed by M. W. Krause; that on the said 14th day of March, 1905, there was issued certificate number One (1) to M. W. Krause for Eighty (80) shares of the capital stock of the said Citizens Bank & Trust Company; that on the same day certificate number Three (3) for Eighty (80) shares of the capital stock of the said Citizens Bank & Trust Company was issued to W. H. Dill; that on the same day certificate number Five (5) for Eighty (80) shares of the capital stock of said Citizens Bank & Trust Company was issued to H. G. Malot; that on the same day certificate number Four (4) for One hundred and twenty (120) shares of the capital stock of the said Citizens Bank & Trust Company was issued to J. E, Guier; that on the same day certificate number Six (6) for Forty (40) shares of the capital stock of said Citizens

Bank & Trust Company was issued to Sam Ward; that each of the said defendants undertook and agreed to pay to the said Citizens Bank & Trust Company the par value of the respective shares of stock issued to them, namely That M. W. Krause undertook and agreed to pay the Citizens Bank & Trust Company for the one hundred twenty (120) shares of stock issued to him, the sum of three thousand ($3,000.00)dollars; that H. G. Malot undertook and agreed to pay the par value of the Eighty (80) shares of stock issued to him, to-wit, Two thousand ($2,000.00) dollars; that W. H. Dill undertook and agreed to pay said Citizens Bank & Trust Company the par value of the Eighty (80) shares of stock issued to him, to-wit, Two Thousand ($2,000.00) dollars; that Sam Ward undertook and agreed to pay said Citizens Bank & Trust Company the par value of the Forty (40) shares of stock issued to him to-wit, One Thousand ($1,000.00) dollars; that J. E. Guier undertook and agreed to pay said Citizens Bank & Trust Company the par value of the One Hundred and twenty (120) shares of stock issued to him, to-wit, Three thousand ($3,000.00) dollars; that plaintiff is advised and believes and on such information and belief, alleges the facts to be that the only one of said defendants who paid any part of the par value of said stock or anything of value for the stock subscribed for and issued to them was the defendant M. W. Krause who paid to said Citizens Bank & Trust Company the sum of Two Thousand ($2,000.00) dollars, and that after said sum had been paid the same was later returned to said defendant; and, as plaintiff is informed and believes, and on such information and belief alleges the fact to be, the said defendants organ-

ized said Citizens Bank & Trust Company without any purpose or intent to pay for its capital stock or any part thereof, except the Two Thousand ($2,000.00) dollars paid in by the defendant, Krause, and that this sum was paid in with the distinct understanding that it should be returned after the corporation came to be a going concern, the sworn statement in the certificate of incorporation that Ten Thousand ($10,000.00) dollars had been actually paid in to the contrary notwithstanding.

2nd. That the said Citizens Bank & Trust Company was and is insolvent and on the 20th day of February, 1906, on the petition of one of its creditors the plaintiff was appointed, by the United States Court, for the Southern District of the Indian Territory, receiver, to take charge of all of its property and effects and to administer the same under the order of said court, for the benefit of all its creditors; that the liabilities of said Citizens Bank & Trust Company at the time the plaintiff took charge of its assets as receiver, as shown by its books, were, $15,179.02, that a great deal of the paper of said Citizens Bank & Trust Company is worthless and a very small sum can be realized from the same and the rest of its assets; that after six months' effort the plaintiff has only been able to collect on notes Sixty dollars and Fifty cents ($60.50) and to realize on other property the sum of One Hundred ($100.00) dollars; that all of the capital stock of said Citizens Bank & Trust Company represented as paid namely, Ten thousand ($10,000) dollars, and the assets in the hands of the plaintiff, as receiver, will not be sufficient to pay to the creditors of said Citizens Bank & Trust Company.

3rd. That on a partial presentation of the foregoing fact to Judge J. T. Dickerson, an order was made on the 15th day of August, 1906 directing the plaintiff, as receiver, to retain counsel and to institute proper proceedings against the defendants as subscribers for the capital stock of the said Citizens Bank & Trust Company to recover the respective amounts remaining unpaid on said subscription, or for the stock issued to them, for the benefit of all the creditors of the Citizens Bank & Trust Company; that this suit is filed in compliance with said order; that the plaintiff has made demand on each of the said defendants for the amount due on his subscription, or for the stock of said Citizens Bank & Trust Company issued to him; that they have each failed, neglected and refused to pay the same or any part thereof; that there is now due the plaintiff as receiver of the Citizens Bank & Trust Company as unpaid subscriptions for capital stock issued to them, namely; M. W. Krause, Three thousand ($3,000.00) dollars, W. H. Dill, Two Thousand ($2,000.00) dollars, H. G. Malot, Two Thousand ($2,000.00) dollars, Sam Ward One Thousand ($1,000.00) dollars, J. E, Guier, Three Thousand ($3,000.00) dollars together with interest thereof from the 14th day of March, 1905.

4th. That the plaintiff has no adequate remedy at law and unless this Court takes jurisdiction of this suit in Equity, he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions.

Wherefore the plaintiff prays the decree of this Court in his favor as receiver, against M. W. Krause for Three Thousand ($3,000.00) dollars and interest, against H. G. Malot for Two Thousand ($2,000.00) dollars and interest, against Sam Ward for One Thousand ($1,000.00) dollars and interest and against J. E. Guier for Three Thousand ($3,000.00) dollars and interest, and for such other and further relief, as to the Court may seem just and proper.

W. H. EBEY,
Receiver Citizens Bank & Trust Company.
By GAILBRAITH & McKEOWN,
His Attorneys.

To the Bill the plaintiff in error demurred.
Transcript p. 14.

The demurrer is as follows.

In the United States Court for the Western Judicial District of the Indian Territory, Sitting at Okmulgee, 1907.

W. H. Ebey, Receiver of the Citizens Bank & Trust Company, Plaintiff,

vs.

M. W. Krause, W. H. Dill, H. G. Malot, J. E. Guier and Sam Ward, Defendants.

Demurrer.

Comes now the defendant, W. H. Dill, and demurs to the plaintiff's complaint and for grounds says, that said complaint does not state any sufficient facts to authorize a court of equity to assume jurisdiction; that said complaint shows upon its face that the plaintiff has a plain, adequate and complete remedy at law,

And for further reason this defendant is entitled to a trial by a jury under the laws and constitution of the United States of which this defendant would be deprived should this cause be tried in equity.

And for the further reason this Court has no jurisdiction in equity to hear and determine the said cause.

Wherefore defendant prays that the complaint be dismissed for want of equity.

C. T. HUDDLESTON,
Attorney for Defendant, W. H. Dill.

On November 5, 1907, the Court overruled the demurrer and Dill duly excepted. Transcript p. 15.

The State of Oklahoma was admitted into the Union on November 17, 1907.

On December 6th, 1907, this cause was transferred to the District Court of Okfuskee County, State of Oklahoma, in which Court the subsequent proceedings prior to appeal were had. (Transcript p. 15.)

On December 17, 1907, Dill filed his separate answer in said cause as follows:

In the District Court for Okfuskee County, State of Oklahoma.

W. H. Ebey, as Receiver of the Citizens Bank & Trust Company, Plaintiff.

vs.

M, W. Krause, W. H. Dill, H. G. Malot, J. E. Guier, and Sam Ward, Defendants.

Answer.

Comes now the defendant, W. H. Dill, and states to the Court for his answer to the plaintiff's complaint:

That he admits that M. W. Krause, W. H. Dill, J. E. Guier and Sam Ward as corporators organized the Citizens Bank & Trust Company of Stonewall, Indian Territory, for the purpose of doing a general banking business at said place.

That M. W. Krause was elected President, and W. H. Dill as Vice-President and J. E. Guier as cashier of said bank;

That said W. H. Dill subscribed for Eighty (80) shares of the capital stock of the said Citizens Bank & Trust Company on the 14th day of March or sooner, which this plaintiff is not now sure as to the dates.

That at the time the said W. H. Dill purchased the said Eighty (80) shares of capital stock from the said Citizens Bank & Trust Company, he paid the consideration therefor to the said Citizens Bank & Trust Company.

Defendant, W. H. Dill, denies that he has failed and refused to pay the sum of Two Thousand ($2,000.00) dollars subscribed for the capital stock of the said Citizens Bank & Trust Company, but alleges the truth to be that he has paid to the Citizens Bank & Trust Company every dollar that he agreed to pay the said Bank for the said stock issued to him.

Defendant W. H. Dill, denies that he is indebted to the said plaintiff, in any sum due upon the said stock.

Wherefore, he prays that he may be dismissed from this action, and for his cost in this case and for such further and other relief as the Court may deem just and proper.

C. T. HUDLESTON,
Attorney for Plaintiff.

W. H. Dill being duly sworn upon his oath states that he has read the statements set forth in the foregoing answer, and that the same are true as he verily believes.

W. H. DILL,

Subscribed anl sworn to before me this the 17th day of December 1907.

JOHN JONES,
Notary Public.

My commission expires June 22nd 1912.

The cause was thereafter tried to the Court, without a jury, and no jury was by the plaintiff in error, Dill, ever waived, And on March 25, 1908, the Court rendered judgment against the plaintiff in error, Dill, for the sum of $2,000, with interest thereon at the rate of six per cent per annum from the 14th day of March, 1906, and the costs of suit, and dismissed the bill as to Malot. Transcript pp. 51-52.

From this judgment Dill appealed to the Supreme Court of Oklahoma. His contentions before

that Court, and the questions involved are correctly stated by that Court in its opinion.

After handing down an opinion in the case on May 10, 1910, affirming the judgment of the District Court, counsel for plaintiff in error, Dill, pursuant to the rules of said Court, filed their petition for rehearing, which petition contains their contention before that Court, as well as here.

The petition for rehearing is as follows:

In the Supreme Court of the State of Oklahoma.

W. H. Dill, Plaintiff in Error.

vs.

W. H. Ebey, Receiver, Defendant in Error.

Petition for Rehearing.

The plaintiff in error respectfully requests a rehearing in the above entitled cause and as grounds therefor alleges that the decision of the Court as rendered and filed on the 10th day of May 1910 is in conflict with the Constitution and laws of the State of Oklahoma and with the seventh Amendment to the Constitution of the United States, in this; that the cause of action in this case arose in the Indian Territory prior to the admission of Oklahoma as a state; that it is an action to recover money for the unpaid subscription for shares of stock in a corporation organized under the laws of the Indian Territory; that the action was brought in the United States Court having jurisdiction in the Indian Territory and was there pending undisposed of at the time the State was admitted into the Union; that all

the provisions of the Constitution of the United States was applicable to and in force in the Indian Territory at the time this cause of action arose and at the time that the action was instituted !that by the terms of the Seventh Amendment to the Constitution of the United States it is provided that "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried to a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law;" that the cause of action in this cause is one at common law for the recovery of money only and is triable by jury at the common law, and the decision of the court in this cause deprives the plaintiff in error of the right to trial by jury and is in contravention of his rights under the Constitution of the United States; that by the transfer of said cause into the state court for trial all his rights were preserved and no forms of procedure can be invoked to deprive him of his right to trial by jury; that the decision is contrary to and in conflict with the controlling decision of Hale vs. Allison decided by the Supreme Court of the United States, reported in 188 U. S. 56-47 L. ed. 380, in which it is held that in order to give a court of equity jurisdiction in this class of cases there must "be a community of interests in the questions of law and fact involved in the controversy." In this case there was no community of interests in the questions of fact as between any of the parties. Each defendant had executed an independent and several subscription. Each had made a separate and distinct defence. Each made a different and distinct issue and the case of each and every defendant presented a sep-

arate and independent issue which had to be tried as a separate cause. The pleading was multifarious and a court of equity was without jurisdiction, If the court was exercising a blended jurisdiction then it committed reversible error in denying a jury trial to the plaintiff in error.

The rule in Hale vs. Allison is followed by the Federal courts and this case arose under Federal jurisdiction and is entitled to be tried by the law and practice as interpreted by the Federal Courts.

The case of Hackett et al v. Northern Pac. Ry. Co. 140 Fed. 717 is directly in point and controlling in this case. The case of Wyman vs. Bowman, 127 Fed. 257 makes the distinction between the case at bar and one where the community of interest among the defendants is identical upon every question of law and fact presented by the controversy. The right to proceed in equity to recover unpaid stock subscriptions is only allowed in cases where there are unpaid assessments on all the stock, or where the stock has been payable in installments and only a portion of the installments have been paid or as in the Pennsylvania cases cited in the opinion of the Court, where creditors of the corporation in order to reach the assets of the corporation must resort to equity in order to reach the unpaid balances due from stockholders upon stock subscriptions. That there is a plain and ample remedy at law in this case cannot be questioned. The court sustains the judgment only upon the ground that the remedy by an action at law was not "adequate." The record in this case is a complete answer to the holding of the court. Equity furnished no relief to the plaintiff which

an action at law would not have furnished him yet the defendant has been denied a substantial right by this procedure.

This plaintiff sued four defendants in one action, each upon his own separate individual contract of subscription each defendant answered separately and set up a distinct and separate defense; the case has been tried as to two of the defendants, Malot and Dill; the evidence as to the subscription or liability of one has no relevancy as to the rights or liability of the other. The court found Dill liable and found Malot not liable. The cause has not been tried as to the other two defendants and when trial is had it must be upon separate and distinct issues as to each. Equity has not furnished any more adequate relief than could have been obtained at law. The results conclusively show that the trial court erred in holding that the case was one of equitable cognizance. The Pennsylvania cases quoted from and relied upon by the court are clearly distinguishable both upon the facts and upon principle. In one of those cases the plaintiff was an assignee for the benefit of creditors and brought his action in equity to recover upon unpaid subscriptions of stockholders. There was no question as to the individual liability. Either all the stockholders were liable for the unpaid balances on stock or none were liable, the community of interest among the defendants upon every question of law and facts presented by the issues was identical thus bringing the case within the rule of Hale vs. Allison, *supra*. In the other case cited from Pennsylvania the creditors were plaintiffs and proceeded in equity to reach the debts due the corporation. They could not pro-

ceed at law and a court of Chancery was the only forum which could afford relief.

In the case at bar the Receiver is a Receiver for the corporation and not for the creditors. He, by virtue of his office, may carry on the business of the corporation, marshal its assets, sue for the corporation and collect its choses in action and securities, enforce payment of its obligations due it and of its unpaid stock subscriptions and pay its debts and liabilities. He only represents the creditors to the extent of marshaling the assets and conserving the property of the corporation for the purpose of liquidating claims. The court in its opinion quotes the order of court which appointed the receiver and relies upon this order to some extent in giving support to the holding that the case is a proceeding by the creditors of the insolvent bank. We desire to remind the court that the court which appointed the receiver had no power to confer upon him the authority to bring or prosecute any particular kind of proceeding or to determine the jurisdiction of the court in which an action should be brought by him. That court could not empower him to sue in any particular court or to bring any particular character of action. It might direct him to sue or defend in certain actions but no order made by that court can have any force or weight in determining the question of the jurisdiction in this court or the right of the Receiver to wage a suit in equity rather than an action at law. These questions must be determined upon the facts alleged to constitute the liability of the defendants and the law applicable to such liability.

An assignee for the benefit of creditors takes

title to the property in trust for the creditors by virtue of the deed of assignment executed by the corporation. The entire interest of the corporation passes to the creditors by the deed of assignment. The assignee takes the title in trust for the creditors and the creditors through him enforce their rights. A receiver is an officer of the court, an arm of the court. The property is in *custodia legis,* held by the court for the corporation. The court directs and manages the corporation through the receiver but the title is at all times in the corporation. The receiver acts for and as the board of Directors and officers, he sues for the corporation and the creditors derive only such benefit from such acting as the law gives them in the assets available for payment of debts after paying court expenses. The law and the courts have always made these distinctions and they should be considered in the determination of this cause.

The right to proceed in equity is by this court put upon the ground of the inadequacy of the remedy at law; that equity will intervene to avoid a multiplicity of suits at law. We do not believe that a case can be found in the books where the courts have held that four law suits against four separate defendants have been held to come within that vague and uncertain term, "multiplicity of law suits." In our brief we cited the able, instructive and comprehensive opinion of the Supreme Court of the United States in Hale vs. Allison, 188 U. S. 56. This case is neither discussed or referred to in the opinion of the court. In as much as that court is the highest in the land and its opinions entitled to great weight and grave consideration, and in as much as this case arose before Statehood and the

rights of the defendant are depending upon rights secured to him by the Constitution of the United States and its laws and that his cause may if the parties so elect go to said court for final review, we believe that we are entitled to have the court review the case of Hale vs. Allison and follow it in this case.

The statement of Mr. Justice Peckham shows that one of the two questions there considered and passed upon is identical with the case at bar and in the discussion of the second proposition in that cause beginning on page 71 of the official volume and page 390 of the Lawyers Ed. the court covers fully every point in this case; the order of the court appointing the receiver and its effect, the finding of the court that appointed the receiver that the corporation was insolvent; the necessity of collecting the entire stock subscriptions; the right to sue forty seven subscribers, all residents of one state, in one action—are each discussed and the law fully reviewed and a conclusion reached directly contrary to that reached by the court in this case. This decision which we think is controlling has been entirely overlooked by the court, and for this reason alone we submit that we are entitled to a rehearing.

The rule is stated in clear and positive terms in Hale vs. Allison that "Where the whole amount is sought to be recovered the proceeding must be at law, where less is required the proceeding may be in equity." Let this rule prevail and the proceedings in this case are wrong. The four defendants are sued for the entire amount of their stock subscriptions—the par value of their stock—upon the averment that neither of them had ever paid anything for their stock. This

court does not pass upon or decide this question. The rule announced n Hale v. Allison *supra,* is sustained in

Kennedy vs. Gibson 8 Wall. 498.
United States vs. Knox, 102 U. S. 422.
Bailey vs. Tillinghast, 99 Fed. 801.
Hale vs. Allison, (Dist. Ct.) 102 Fed. 790.
Tompkins vs. Craig et al. 93 Fed. 885.
Casey vs. Galli, 94 U. S. 673.
Auer vs. Lombard, 72 Fed. 211.
Hale vs. Hardon, 89 Fed. 283.

The Court in its opinion holds the evidence sufficient to support the judgment. Upon this question we earnestly but respectfully urge a review of the issues and the evidence in the case. We confidently assert that there is no evidence to warrant the finding of the trial court.

The plaintiff alleges that the defendant Dill had subscribed for 80 shares of stock and that he was indebted to the Bank in the sum of $2,000.00 for said stock. Dill denied that he was indebted upon his subscription. This was the issue. The subscription was in writing and undenied. Payment would ordinarily be presumed. The plaintiff in order to recover was bound to show an indebtedness by the fair preponderance of the evidence. Upon this issue he had the burden. To fail to make the proof entitled the defendant to a finding in his favor. Upon this state of the record the trial was had. The only evidence submitted by the plaintiff was that of the expert Timberlake, a banker, who had examined the books of the Stonewall bank. He testified that the Stonewall Bank started with $10,000.00 paid up capital stock and that the books showed that the Stonewall bank had $10,000.00 to

its credit in the Citizens Bank and Trust Co. of Okemah (Record p. 21.) This shows a payment of all the stock that had been subscribed including the $2,000.00 subscribed by Dill. He further testified that the stock books showed that Dill owned $2,000.00 of the stock and that $2,000.00 was debited to the Citizens Bank and Trust Co. of Okemah. This also was specific proof of payment by Dill. If there is any liability unpaid it is the Okemah bank which must account for this $2,000.00. A deposit of $2,000.00 in the Okemah Bank by Dill to the credit of the Stonewall Bank constitutes a valid payment and this was done as was afterward shown by the cashier of the Okemah Bank. Timberlake also swore (Record p. 21) that the books of the Stonewall bank showed $1,000.00 in the Okemah Bank for the use of the Stonewall Bank. He testified to a number of transactions between the two banks. When asked about the disposition of the $1,000.00 credit in the Okemah Bank he stated (Record p. 22) that the small books of the Stonewall Bank show that checks were drawn on the Okemah Bank which were not on the draft register and that the books at that date showed an indebtedness by the Okemah bank to the Stonewall Bank of $89.91. This balance was all that remained of the $10,000.00 deposit including the other transactions. On page 23 of the record it is shown that Timberlake testified that the books of the Stonewall bank showed a charge of $2,000.00 against W. H. Dill for stock and that this was paid into the Okemah bank on March 14, 1905. He also testified that funds were withdrawn from the Okemah bank by the Stonewall bank "by w're, 'phone and advice" and that funds were transferred from the

Okemah bank to the Stonewall bank "by letter, 'phone and advice" and same was "proper." Now how could the trial court or how can this court say that Dill is indebted upon his stock subscription. Timberlake does not pretend to say what checks were drawn or what money was transferred by letter 'phone or advice. Evidently some money was transferred between the banks in those ways for he testified to the fact that these were the ways that money was transferred between the banks, yet he does not pretend to say what the amounts of these various transactions were although he does give the balance due. We submit that there is no ground for a shadow of inference let alone proof of substantial facts, to show an indebtedness upon Dill's part.

The defendant introduced M. B. Flesher, cashier of the Citizens Bank & Trust Co. of Okemah. He testified (Record p. 29) that W. H. Dill drew his check on March 13, 1905 on the Okemah. He testified (Record p. 29) that W. for $2,000.00 and the check was in the record. That said check was paid on same date. That on the same date the Okemah bank gave the Stonewall bank credit for the item of $2,000.00 represented by Dill's check. (P. 30.) On the same date Dill's account was charged on the books of the Okemah bank with $2,000.00. He also testified that the books of the Stonewall bank show that the same item was charged against the bank at Okemah.

These transactions show conclusively that Dill paid for his stock by depositing in the bank of Okemah the $2,000.00 to the credit of the Stonewall bank, That the Stonewall bank took credit for the same item and that this amount

went into its account at the bank. Dill's check, for $2,000.00 was paid and that amount deducted from his account at the Okemah bank.

No more conclusive proof of payment could be made. The books of the banks show the same transaction and corroborate each other. If the money was lost Dill was not a party to it and if there was any shuffling of accounts the bank and not Dill is liable. If the bank at Stonewall did not get Dill's money the bank at Okemah should account for it. There is however, no shadow of proof that the Stonewall bank did not get the money. Its books so far as introduced show only a small balance against the Okemah bank tending to show that it did get the money if anything. The plaintiff pretends to rely upon the draft register not showing a full withdrawal of all the money while he at no place attempts to account for checks or the other methods of withdrawing money which his own expert testified was carried on and was "proper."

We insist upon a further careful review of this evidence. A great injustice is being done. $2,000.00 with interest for five years is a large item and this matter should not be passed over lightly by the court or decided upon the theory advanced by the trial court that the defendants' attorneys did not produce the witnesses that the court thought he should have produced. The burden was not on the defendant and we contend that he might safely have rested without any proof on his part and been entitled to judgment. The Court says the evidence is sufficient. We insist in good faith that we cannot find such evidence in the record. We think that we have a right to have the court point out the evidence

which it says is sufficient to support the judgment. If the court says that by failure to make proof the Receiver is entitled to recover then there would be support for the conclusion. We contend that this is a law case and that the authorities cited by us support our contention. We insist that we are entitled to a jury trial and that the laws of Congress and the Constitution of the United States guarantee us this right of which the court has deprived us. We insist that there is no testimony to support the averment that Dill has never paid for his stock but on the contrary that the testimony submitted by the Receiver shows conclusively that he did pay for it. The record abundantly supports us upon both of these contentions. We submit this motion with the greatest respect believing that the court in the multiplicity of its duties and multifariousness of its investigations has become confused in the mass of figures and transactions sworn to and has overlooked the controlling points both as to law and fact in this case. For these reasons we earnestly pray a reconsideration and rehearing.

Respectfully submitted,

BURFORD & BURFORD,
C. T. HUDDLESTON,
Attorneys for Plaintiff in Error.

Thereafter the Court withdrew its former opinion,, modified and re-filed it, and overruled the petition for rehearing. The final opinion of the Court is found in the transcript pps. 70 to 79, and is as follows:

Opinion of the Court by

KANE, J.:

This suit was filed prior to statehood, in the United States Court for the western district of the Indian Territory, sitting at Okmulgee, on the equity side of the docket, by the defendant in error, W. H. Ebey, as receiver of the Citizens Bank and Trust Company of Stonewall, as plaintiff, against the plaintiffs in error, M. W. Krause, W. H. Dill, H. G, Malot, J. E. Guier and Sam Ward, as defendants. The complaint omitting the caption, is in words and figures as follows:

"Comes now the said plaintiff and represents that he is the duly appointed, qualified receiver of the Citizens Bank & Trust Company of Stonewall, Indian Territory, a corporation, organized under the laws of the Indian Territory and engaged in business at Stonewall prior to the time of the appointment of the plaintiff as its receiver, and that the defendants W. H. Dill and H. G. Malot, are citizens of the western district of the Indian Territory, and reside nearer to Okmulgee than any other place of holding court in said district, and for cause of action the plaintiff avers: 1. That heretofore, to-wit, on or about the 14th day of March, 1905, the said defendants, M. W. Krause, J. E. Guier, W. H. Dill and Sam Ward as corporators, organized the Citizens Bank & Trust Company for the purpose of transacting a general banking and trust business at Stonewall in the Indian Territory; that M. W. Krause was elected president, and W. H. Dill was elected vice-president and J. E, Guier was elected cashier of said corporation; that said officers together with Sam Ward

constituted the first board of directors of said Citizens Bank & Trust Company, and the articles of incorporation and certificate required by law were filed with the clerk of the United States Court of Appeals for the Indian Territory, at South McAlester, on the 13th day of February, 1905; that the objects and purposes of said corporation were set out in detail in the certificate filed as aforesaid, and said certificate also recites that the capital stock of said Citizens Bank & Trust Company is and was twenty-five thousand dollars ($25,000.00), divided into shares of twenty-five dollars each, and that ten thousand dollars of said capital stock had been actually paid in by the subscribers and that the names of the stockholders and the number of shares subscribed for by them are as follows: M. W. Krause, president, 120 shares; W. H. Dill, 80 shares; J. E. Guier, 160 shares; and Sam Ward, 40 shares; that on the said 14th day of March, 1905, as the plaintiff is advised and believes, and on such information and belief, alleges the fact to be, H. G. Malot subscribed for 80 shares of the capital stock of the Citizens Bank & Trust Company, taking 40 shares of the 160 shares subscribed for by J. E. Guier, and 40 shares of the 120 subscribed for by M. W. Krause; that on the said 14th day of March, 1905, there was issued certificate number 1 to M. W. Krause for 80 shares of the Capital stock of the said Citizens Bank & Trust Company; that on the same day certificate number 3 for 80 shares of the capital stock of the said Citizens Bank & Trust Company was issued to W. H. Dill; that on the same day certificate number 5 for 80 shares of the capital stock of said Citizens Bank & Trust Company was issued to H, G. Malot; that on the same day cer-

tificate number 4 for 120 shares of the capital stock of the said Citizens Bank & Trust Company was issued to J. E. Guier; that on the same day certificate number 6 for 40 shares of the capital stock of the said Citizens Bank & Trust Company was issued to Sam Ward; that each of the said defendants undertook and agreed to pay the said Citizens Bank & Trust Company the par value of the respective shares of stock issued to them, namely: That M. W. Krause undertook and agreed to pay to the Citizens Bank & Trust Company for the 120 shares of stock issued to him, the sum of three thousand dollars; that H. G. Malot undertook and agreed to pay the par value of the 80 shares of stock issued to him, to-wit, two thousand dollars; that W. H. Dill undertook and agreed to pay said Citizens Bank & Trust Company the par value of the 80 shares of stock issued to him, to-wit, two thousand dollars; that Sam Ward undertook and agreed to pay said Citizens Bank & Trust Company the par value of the 40 shares of stock issued to him, to-wit, one thousand dollars; that J. E. Guier undertook and agreed to pay said Citizens Bank & Trust Company the par value of the 120 shares of stock issued to him, to-wit, three thousand dollars. That plaintiff is advised and believes and on such information and belief, alleges the facts to be that the only one of said defendants who paid any part of the par value of said stock or anything of value for the stock subscribed for and issued to them, was the defendant M. W. Krause, who paid to the Citizens Bank & Trust Company the sum of two thousand dollars; and that after said sum had been paid the same was later returned to said defendant; and, as plaintiff is informed and believes, and on such inform-

ation and belief alleges, the fact to be, the said defendants organized said Citizens Bank & Trust Company without any purpose or intent to pay for its capital stock or any part thereof, except the two thousand dollars paid in by the defendant, Krause, and that this sum was paid in with the distinct understanding that it should be returned after the corporation came to be a going concern, the sworn statement in the certificate of incorporation that ten thousand dollars had been actually paid in to the contrary notwithstanding. 2. That the said Citizens Bank & Trust Company was and is insolvent and on the 20th day of February, 1906, on the petition of one of its creditors the plaintiff was appointed by the United States court for the southern district of the Indian Territory, receiver to take charge of all of its property and effects, and to administer the same under the order of said court, for the benefit of all its creditors; that the liabilities of said Citizens Bank & Trust Company at the time the plaintiff took charge of its assets as receiver as shown by its books, were $15,179.02; that a great deal of the paper of said Citizens Bank & Trust Company is worthless and a very small sum can be realized from the same and the rest of its assets; that after six months' efforts the plaintiff has only been able to collect on notes $60.50, and to realize on other property the sum of $100.00; that all of the capital stock of said Citizens Bank & Trust Company represented as paid in, namely, ten thousand dollars, and the assets in the hands of the plaintiff, as receiver, will not be sufficient to pay to the creditors of said Citizens Bank & Trust Company. 3 That on a partial presentation of the foregoing facts to Judge J. T. Dickerson, an order was made on the

15th day of August, 1906, directing the plaintiff, as receiver, to retain counsel and to institute proper proceedings against the defendants as subscribers for the capital stock of the said Citizens Bank & Trust Company to recover the respective amounts remaining unpaid on said subscriptions, or for the stock issued to them, for the benefit of all the creditors of the Citizens Bank & Trust Company; that this suit is filed in compliance with said order; that the plaintiff has made demand on each of said defendants for the amount due on his subscription, or for the stock of said Citizens Bank and Trust Company issued to him; that they have each failed, neglected and refused to pay the same or any part thereof; that there is now due the plaintiff as receiver of the Citizens Bank & Trust Company as unpaid subscription for capital stock issued to them, namely: M. W. Krause, three thousand dollars; W. H. Dill, two thousand dollars; H. G. Malot, two thousand dollars; Sam Ward, one thousand dollars; J. E. Guier, three thousand dollars, together with interest thereon from the 14th day of March, 1905. 4. That the plaintiff has no adequate remedy at law and unless this court takes jurisdiction of this suit in equity he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such action. Wherefore, the plaintiff prays the decree of this court in his favor as receiver against M. W. Krause for three thousand dollars, and interest; against H. G. Malot, for two thousand dollars and interest; against W. H. Dill, for two thousand dollars and interest; against J. E. Guier,

for three thousand dollars and interest; and for such other and further relief as to the court may seem just and proper." To this complaint defendant W. H. Dill filed a demurrer, upon the grounds. (1) That said complaint does not state any sufficient facts to authorize a court of equity to assume jurisdiction; (2) That said complaint shows upon its face that complainant has a complete, adequate remedy at law; (3) That this defendant is entitled to a trial by jury under the law and constitution of the United States, of which he would be deprived should this cause be tried in equity; (4) For the reason that said court has no jurisdiction in equity to hear and determine the said cause.

This demurrer was overruled by the court, to which ruling the defendant Dill duly excepted. After statehood the cause was transferred from the district court for Okmulgee county, to the District Court for Okfuskee County and the defendant Dill was given thirty days within which to file his answer. The answer of Dill amounted to an admission that he subscribed to the stock, and an averment that he had paid for the same. Mr. Dill seems to be the only defendant to file any pleadings, although the record shows that defendant Malot appeared at the trial in person and by counsel. Upon trial the court found in favor of the defendant Malot and against the defendant Dill, and entered a decree dismissing the cause against Malot, and that the plaintiff W. H. Ebey, as receiver of the Citizens Bank & Trust Company of Stonewall, do have and recover of and from the defendant W. H. Dill, the sum of two thousand dollars, together with interest thereon from the 14th day of March, 1905, and the costs incurred by him in this action. To

reverse this judgment this proceeding in error was commenced. The main contention of counsel for plaintiff in error is that the obligations arising under the facts stated in the complaint are legal and not equitable; that they are based upon the contract of subscription and each subscription constitutes a separate obligation, that may be dependent upon separate, independent and distinct facts; that the action stated is equitable in form only, being but a bundle of separate actions, each of which grows out of and rests upon an independent and distinct transaction; that the relief prayed for is not of an equitable nature; that the object and purpose of the action is the recovery of money, and in all such cases, where a money judgment only is prayed for, a court of equity is without jurisdiction. Counsel base their contentions upon the rule laid down in the case of Tompkins v. Craig, et al., 93 Fed. 885, from which they quote as follows: "The bill is demurred to upon the ground of multifariousness, and we think the objection must prevail. The statute does not impose a joint but a several liability upon the defendants, and they have no common interest in the decree asked for by the bill. The plaintiff seeks to support the action upon the ground that such a proceeding will prevent a multiplicity of suits, but this is a reason in form rather than in substance; for, while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant. The liability is legal, and not equitable. It is based upon the stockholder's contract of subscription.

an implied term of that contract being the declaration of the statute that a certain contingent liability should follow the subscription. Each contract is a separate obligation, and should be separately enforced. As was pointed out upon the argument by the learned counsel for the defendants, this is not a proceeding to determine how large the assessment should be. For obvious reasons, such an inquiry should be made in equity, and all the stockholders should be parties. But after the rate of assessment has been fixed, and the individual liability of each stockholder has thus been ascertained, the enforcement of such liability is the proper subject of a suit at law, in which the separate rights of the defendant stockholder are distinctively to be considered. Flash v. Conn., 109 U. S. 380, 3 Sup. Ct. 263." We think the case at bar is somewhat distinguishable from the case above quoted from and from the other cases to the same effect cited by counsel. In those cases the receiver appointed by the court to wind up the affairs of the respective corporations represented the corporations in the suits in which they appeared as parties. In the complaint herein there is an allegation to the effect, that on a showing made to the judge who appointed the receiver that the corporation was entirely insolvent and that there would be no funds arising from the sale of its assets for distribution amongst the stockholders, he directed the receiver to retain counsel and institute proper proceedings against the defendants as subscribers of the capital stock of said Citizens Bank & Trust Company, to recover the respective amounts remaining unpaid on said subscription or for the stock issued to them, for the benefit of all the creditors of the Citizens

Bank & Trust Company, and that this suit was filed in compliance with said order. It seems to us the foregoing allegation brings the instant case within the rule laid down in Fletcher, et al. v. Bank of Lonoke, et al., 71 Ark., 1, 69 S. W. That was an action commenced by the receiver and other creditors for the use of the German National Bank and certain other creditors of the Bank of Lonoke, against the latter bank, C. W. England and other stockholders thereof, to recover so much of the stock of such shareholders as remained unpaid. Battle, J., in discussing the jurisdictional question raised, says: "The authority of the receiver to bring the action is not shown. We shall treat it as brought by creditors." And on that ground sustained the jurisdiction of the court. Counsel for plaintiff in error, in distinguishing the Arkansas case from the case at bar, quoted the foregoing statement by the Judge who delivered the opinion for the court, and says: "Upon the theory that the suit was by the creditors of the bank, of course equity had jurisdiction." These cases seem to be similar in principle at least. The Arkansas suit was instituted for the use of the German National Bank and certain other creditors of the Bank of Lonoke, and this, by positive direction of the court, was commenced by the receiver for the benefit of all the creditors of the Citizens Bank & Trust Company, the insolvent corporation, after it was made to appear that the assets of the bank were entirely inadequate to pay the creditors. In Lanigan v. North, 69 Ark. 62, it was held that a liability created against the stockholders of a banking corporation may be enforced by a creditor in the courts of that state at law as well as in equity, and this

notwithstanding it was held that, "the statute definitely fixes the proportion of each debt or claim for which the stockholder is liable." As the laws of Arkansas were in force in the Indian Territory at that time the obligation herein was incurred and this suit commenced, the decisions of the supreme court of that state although rendered after said laws were put in force in said territory, are entitled to great weight. The case of Cook, et al v. Carpenter, et al., 212 Pa. 165, was a suit in equity by Cook as assignee of an insolvent corporation, against various stockholders to recover unpaid subscriptions to the capital stock. As in this case the jurisdiction of a court of equity to determine such a cause was raised. Mr. Chief Justice Mitchell, who delivered the opinion of the court, in discussing this proposition, says: "The preliminary question is the jurisdiction in equity. Appellants insist that there is a plain, full, and adequate remedy at law, by suits against the several stockholders defendant, where each can—defendant upon his own case, untrammeled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable, but is it a full and adequate remedy in the sense that it bars the jurisdiction of equity? The subject of the controversy is the collection and administration of corporate assets as a trust fund for the benefit of corporate creditors. Both the control of corporate matters and trust funds are in general the subject of equitable jurisdiction. As was said in Lane's Appeal, 105 Pa. 49, 65, 51 Am. Rep. 166: 'When insolvency and exhaustion of assets (of corporations) exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because

then the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceedings originates in the name of one, or several, or of all the creditors, the result is the same in each. The capital, when recovered, inures to the benefit of all, and must be distributed among all ratably.' This result as to collection, and still more forcibly as to distribution, is not reasonably practicable, except in equity. A bill may be filed, as in this case, by assignees representing the corporation for the benefit of creditors, or, as in Lane's Appeal, supra, by creditors in their own names in behalf of themselves and others. In the latter case an action at law would present insuperable difficulties, and yet the substantial controversy is the same, and the mere difference in the nominal complaint should not oust in one case the jurisdiction that must be sustained in the other.

"It is earnestly argued by appellants that in all the cases where a bill has been sustained an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground alone, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true that the necessity for an account is a large and influential element in equitable relief; but we do not find it said in any of the cases that its presence or absence is the conclusive jurisdictional fact. In the present case the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the averments and thus made the necessity of an accounting and assessment an issue; that would at once have

made the case one cognizable in equity. Citizens & M. Sav. Bank & T. Co. v. Gillespie, 115 Pa. 564, 9 Atl. 73, was an action at law in which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for payment of debts, or only part, and, if so, how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees some stockholders defendant might have to pay their subscriptions in full while some paid only part, and others perhaps nothing at all. This would be incurring certain inconvenience and quite probable injustice, where the relief should not only be certain, but uniform. As was well said by the learned judge before: "There are more than forty, defendants. Most of them live within the jurisdiction; some do not; and it is quite conceivable that there might be hundreds living without the jurisdiction, not reachable by our process at law. The question involved in all the cases is substantially the same, namely, Ought the corporation to collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any. If, on the other hand, it should be collected, then none should escape.'

"In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable in common law forms. When later the legislature granted equitable powers, it was held that, if the subject of a bill was one within the proper and established jurisdiction of chan-

cery, the invention of a new remedy in common law form, or the extension of an old one, would not necessarily oust the equitable jurisdiction. Wesley Church v. Moore, 10 Pa. 273. The question in such cases turns on the completeness, adequacy, and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements. Kirkpatrick v. M'Donald, 11 Pa. 387; Bierbower's Appeal, 107 Pa. 14; Brush Electric Co's Appeal, 114 Pa. 574, 7 Atl. 794; Johnston v. Price, 172 Pa. 427, 33 Atl. 688; Gray v. Citizens' Gas Co. 206 Pa. 303, 55 Atl. 988. In the last case it was said by our Brother Dean: 'The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has; but whether, in view of the facts, it is an adequate one.' It may be conceded that the time is not very remote in our judicial history, when a wronged party sought the intervention of equity, and he could be truthfully met by the reply. 'You have a remedy at law in an action for damages;' such reply would have been the end of his bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction; courts now go further, and inquire whether, under the facts, the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of.' Testing by this standard the numerous actions that would be required at law, and comparing that remedy with the superior certainty, uniformity, and convenience of the present bill, we have no hesitation in holding' that it is a proper case for equitable jurisdiction." In Hayden v. Thompson, 71 Fed. 60, the right of a receiver of an in-

solvent national bank to maintain a bill in equity against the shareholders of the bank, collectively, to recover dividends which had been paid in violation of the national banking laws, was upheld. The right to sue in equity was maintained on the ground of avoiding a multiplicity of actions; also, on the ground that the suit was one to redress a fraud and breaches of trust; and generally, because the remedy at law was inadequate. The doctrine is well settled in the federal courts that, in those cases where the right of a court of equity to afford redress for wrongful acts depends upon the inadequacy of the legal remedy, courts of equity may exercise jurisdiction unless the legal remedy is as plain, practical and efficient to the ends of justice and its prompt administration as the remedy in equity. In determining whether a suitor should be permitted to sue in equity, the federal courts have always attached much importance to the fact that the remedy in the latter forum, as compared with the remedy at law, will save time and expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Cockrill v. Cooper, et al., 86 Fed. 7; Boyce Exrs, v. Grundy, 3 Pet. 210; Oelrich v. Spain, 15 Wall. 211; Preteca v. Land Co., 50 Fed. 674. If the foregoing principles are applied to the case at bar, we think it may be safely asserted that the receiver is entitled to invoke the remedial powers and processes of a court of equity to redress the wrongs of which he complains.

All the other errors assigned by counsel for plaintiffs in error hinge upon the ruling of the court upon the foregoing, except the assignment that the judgment is not supported by the evidence. We have examined the record very care-

fully, and are of the opinion that there was sufficient competent evidence introduced at the trial to support the findings of the court below. The judgment of the court below is affirmed.

Dunn, C. J., Williams, Hayes, and Turner, JJ., concur.

Thereupon, the plaintiff in error, William H. Dill, has brought the case to this Court, by petition in error, and his assignment of errors in this Court appear on pp. 2 and 3 of the transcript, and is as follows:

In the Supreme Court of the State of Oklahoma.

No. —.

W. H. Dill, Plaintiff in Error.

vs.

W. H. Ebey, Receiver of the Citizens Bank & Trust Company of Stonewall, Defendant in Error.

Petition for Writ of Error, Assignment and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the plaintiff in error hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said W. H. Dill assigns the following errors in the records and proceedings of the said case:

The Supreme Court of Oklahoma erred in holding and deciding that said action was not one on contract for the recovery of money in which there was an adequate remedy at law, and in denying to the plaintiff the right to trial by jury of the issues in said cause. The said right to a trial by jury of the issues in said cause was specially set up and claimed under the Seventh Amendment to the Constitution of the United States, as well as under the provisions of the statutes of the United States, the cause having been brought in the United States Court in the Indian Territory prior to the admission of the State and transferred to the State Court by operation of a Federal statute; and said right and demand for a jury trial was denied the plaintiff in error by the judgment of said Court. The said errors are more particularly set forth as follows:

The Supreme Court of Oklahoma erred in holding and deciding:

First. That the cause of action set out in the petition was not an action on a contract in which a plain, adequate and complete remedy could be had at law as contemplated in Section 723, Revised Statutes, United States.

Second. That a court of equity would take cognizance of an action to recover a money judgment on contract because four different defendants were joined in the same action, their liability depending upon independent contracts to which each had a separate defense; the cause having arisen in the Indian Territory and the action having been commenced in the courts of the United States, in the Indian Territory, prior to

the admission of the State of Oklahoma into the Union.

Third. That the plaintiff in error was not entitled to a jury trial upon the issues in said cause under the provisions of the Seventh Amendment to the Constitution of the United States.

Fourth. That the laws of the State of Oklahoma could deprive the plaintiff in error of the right to a jury trial in said cause, the said right having arisen under the Constitution and laws of the United States, before the laws of Oklahoma were extended over said jurisdiction.

Fifth. That a court of equity by taking jurisdiction of a cause, which cause was not of equitable cognizance, has the power thereby to deprive the plaintiff in error of the right to a trial by jury, which right is guaranteed by the Seventh Amendment to the Constitution. For which errors the said W. H. Dill, Plaintiff in Error, prays that the said judgment of the Supreme Court of the State of Oklahoma, dated November 16th, 1910, be reversed and a judgment rendered in favor of the Plaintiff in Error for costs.

JOHN H. BURFORD,
FRANK B. BURFORD,
JOHN DEVEREUX,
Attorneys for Plaintiff in Error W. H. Dill.

LAW AND PROCEDURE.

This cause originated in the United States Court for the Indian Territory, prior to the admission of the State of Oklahoma into the Union. A portion of the proceedings were had in that Court, but the trial was had and judgment rendered in the District Court of Okfuskee County, State of Oklahoma, the successor of the United States Court for this character of pending cases. From the judgment of the District Court an appeal was taken to the Supreme Court of the State, which Court affirmed the judgment of the trial Court. From the later judgment the cause comes to this Court on writ of error.

Prior to the admission of the State, appeals from the judgments of the District Court in the Indian Territory, in civil cases, were taken to the United States Court of Appeals in the Indian Territory, and the judgments and decrees of that Court were reviewable by the Circuit Court of Appeals of the Eighth Circuit.

Act March 3, 1905, 33 Stat., 1081.
Laurel Oil and Gas Co. vs. Galbreath Oil and Gas Company, 165 Fed., 162.

By the terms of the Enabling Act, 34 Stat. 267, as amended, 34 Stat. 1287, it is provided:

"That all causes, proceedings, and matters, civil or criminal, pending in the District Courts of Oklahoma Territory, or in the United States Courts in the Indian Territory, at the time said Territories became a State, not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be proceeded with, held and determined by the courts of said State, the successors of said District Courts of the Territory of Oklahoma, and the United States Courts in the Indian Territory, with the right to prosecute appeals or writs of error to the Supreme or Appellate Court of said State, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the Supreme or Appellate Court of such State to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the Supreme or final Appellate Court of a State to the Supreme Court of the United States."

This provision of the Enabling Act was supplemented by Sec. 1, of the Schedule to the State Constitution:

"No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the forms of Government, but all shall continue as if no change in the forms of Government had taken place."

The Supreme Court of Oklahoma in Blanchard & Co. vs. Ezell, 106 Pac. 960, said:

"The purpose of this section of the Sched-

> dule is to preserve all rights already accrued, and either in action or capable of being enforced by the ordinary remedies provided for this purpose, as effectively as if the Constitution had not been adopted. The language is broad enough to include all rights and claims whatever their nature. No distinction is made between statutory rights and those existing at the common law, nor between those arising out of torts and those founded upon contract."

In Garnsey vs. State, 112 Pac. 24, the Criminal Court of Appeals held that this provision of the schedule preserves to one who had committed a felony in the Indian Territory prior to Statehood, the right to be charged by indictment returned by a grand jury, notwithstanding the Constitution of the State authorizes the prosecution of felonies by information.

In Pacific Mutual Life Ins. Co. vs. Adams, 112 Pac., 1026, the Supreme Court of the State again said:

> "Defendant contends that as this suit was brought prior to Statehood, it had when brought, a right to a common law jury of twelve under the seventh amendment to the Federal Constitution, and to a unanimous verdict, and that said right was unaffected by said change in the form of Government and by said section of the State Constitution. The point is well taken. The right claimed was one of procedure existing in an action pending at the time of admission of the

State and continued unaffected by virtue of Section 1, of the Schedule to the Constitution."

The same rule was held to apply in causes pending in the Courts of the Indian Territory prior to Statehood in Choctaw Electric Company vs. Clark, 114 Pac., 730. It is said in the syllabus, which is by Statute made the law of the case:

> "In the Indian Territory prior to the admission of the State, a party to a civil action under the seventh amendment to the Federal Constitution, was entitled to a jury of twelve and a unanimous verdict. This right as to pending actions was upon the admission of the state continued by Section 1 of the schedule of the Constitution, and Section 19, Article 2, of the Constitution authorizing three fourths of the number of jurors concurring to render a verdict in civil action, has no application to causes pending in the United States Courts of the Indian Territory, at the time of the admission of the State."

To the same effect is Swift vs. Coulter, 115 Pac. 871. It was held by the Circuit Court of Appeals of the Eighth Circuit 171 Fed., 319; 96 C. C. A., 211, St. L. & F. R. Co. vs. Cundieff:

> "That the civil causes pending in the Indian Territory should after Statehood, continue under the law in force in the Indian Territory."

and this rule was held to apply to matters of procedure as well as of merit.

From these authorities the conclusion is inevitable that in the case at bar the plaintiff in error was under the seventh amendment to the Federal Constitution, entitled to a trial by jury, if the case presented by the pleadings was a law case and not properly cognizable in equity; and the transfer of the case from the United States Court in the Indian Territory to the District Court of the State did not in any manner affect this right. Neither did the adoption of the Constitution and the admission of the State deprive him of this right. Upon the contrary this change in conditions preserved to him his rights as they existed prior to the admission of the State.

RIGHT TO JURY TRIAL.

There is but one question to be determined by this Court, but incidentally others are involved.

Our contention is that the action brought by the plaintiff in the trial court was one to recover a money judgment upon a written contract.

That the law afforded him a plain, adequate, and complete remedy.

That the bill was multifarious in that the plaintiff sought to recover several separate judgments

against a number of persons, in whom there was no community of interest.

FEDERAL QUESTION INVOLVED.

It expressly appears in the opinion of the Supreme Court of the State that the plaintiff in error asserted his claim in the trial Court, and renewed in the appellate court, for a jury trial, and based his claim upon the seventh amendment to the Federal Constitution, which prevailed in the jurisdiction where the proceedings against him were instituted.

It also clearly appears from the record, as well as by the opinion of the Court, that the right of trial by jury claimed by him was denied him by the Court.

This demand of a right conferred by the Constitution of the United States and denied by the judgment of the highest Court of the State, presents the question which gives this Court jurisdiction.

The case is brought here on writ of error to the Supreme Court of the State, the only mode by which the judgment of the highest Court of a State may be brought to this Court for review.

Sec. 709, R. S., as amended by Act of Feb. 18, 1875.
New Code, Sec. 226.

The right to this remedy in this particular case was specifically conferred by the provisions of the Enabling Act, *supra*.

Under the Constitution and Acts of Congress, the courts cannot take jurisdiction in equity, where there is a plain, adequate, and complete remedy at law; and although objection to the jurisdiction in equity is not made by demurrer, plea, or answer, or suggested by counsel, it is the duty of the court, where it clearly exists, to recognize of its own motion, and to give it effect.

In Indian Land & C. Co. vs. Shoenfelt, 135 Fed. 484, C. C. A. 8th Circuit, Judge Sanborn said:

> "The seventh amendment to the Constitution of the United States which has been extended over the Indian Territory by Act of Congress (26 Stat. pp. 81-96, C. 182, Sec. 31) provides that in suits at Common Law where the value in controversy exceeds twenty dollars, the right to trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined by any Court in the United States, than according to the rules of the Common Law."

Congress has enacted that,

> "Suits in equity, shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law." Rev. Stat. Sec. 723.

In Hipp vs. Babin, 19 How 271-278, 15 Law Ed., 633, the Supreme Court declared that,

> "Whenever a Court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a Court of Equity, the plaintiff must proceed at law, because the defendant has a constitutional right to trial by jury."

Thomas vs. Council Bluffs Canning Co. 34 C. C. A. 428, 92 Fed. 424.

Although this objection to the jurisdiction in equity of a National Court is not made by demurrer, plea, or answer, or suggested by Counsel, it is the duty of the court, where it exists, to recognize it of its own motion and to give it effect. Lewis vs. Cocks, 23 Wall 466-470; 23 Law. Ed. 70; Hipp vs. Babin, 19 How, 271; 15 Law Ed. 63.

We come squarely within the rule of this case, as there is no relief in the case that a court of law cannot as quickly, as completely and as adequately give to the plaintiff and at the same time preserve to the defendant his constitutional right to a jury trial. He raised the question by demurrer and by plea in the trial Court, and has insisted upon his right at every subsequent step.

In Black vs. Jackson, 177 U. S. 349, 44 Law Ed.

801. This court reversed the Supreme Court of the Territory of Oklahoma upon the same principle that we are here contending for. It was there held that the Court could not convert an action for possession of real estate into an equitable proceeding, and thus deprive the defendant of his constitutional right to a jury trial. The opinion of the late Justice Harlan is instructive on the point in issue here, and makes clear that mere delays in procedure, numerous appeals and other causes of a similar character of which a defendant may avail himself in an action at law are not sufficient to warrant the application of equitable remedies to the trial of common law rights. And it is there said that there must be some well defined ground of equitable cognizance to warrant a Court of Equity in assuming jurisdiction.

This rule seems to be sound and supported by the best reasoned cases.

> "When a creditor comes into this Court (a court of equity) for relief, he must come not merely to obtain a decree or satisfaction of a judgment, but he must present facts which form a case of equity jurisdiction."
>
> Donovan vs. Finn. Hopk. Ch. 59.
> 14 Am. Dec. 531.
> Adams Eq. p. 6.
> Buford vs. Buford 1 Bibb. 305.
>
> "The party here whose choses in action are

sought to be subjected to complainants judgment against it as a corporation, and the claim in its favor sought to be reached are debts which the other respondents, the Hendersons and others, owe the corporation as subscriptions for or to its capital stock, evidenced by promises to pay stipulated sums severally. And this is the distinction adverted to next above and which at the time the present bill was filed was supposed indeed has been held to be a material one. It was at that time supposed, and had been in effect held that the capital stock of a corporation was a trust fund for creditors, and it is fair to assume that this bill was filed and prosecuted on that theory. Of course, if the theory is sound,—if the capital stock of a corporation is a trust fund,—subscriptions to the stock, debts due the fund, have a trust character impressed upon them also, and courts of equity, whether there be a remedy at law or not, may under their general jurisdiction to administer trust estates, enforce the payment of such debts to the *cestuis que trust* the creditors of the corporation. This doctrine considered in and of itself, has in times past received the recognition of this court in *dicta* at least, and as part of the broader proposition that the property of a corporation under certain conditions constitutes a trust fund for its creditors, it was at one time supported by express decisions of this court.

"It is the established doctrine now in many jurisdictions; but not so with us. To the contrary, the proposition as a whole, and in every part, has been repudiated by this Court, and it has been directly ruled, adjudged, and settled that the assets of a corporation, and its capital stock, and subscriptions due to its capital stock

are in part its assets, under no circumstances constitute a trust fund for its creditors, but that so far as creditors are concerned, all its property, including its choses in action of all kinds, is held and owned by it just as property, choses in action, or what not, is held and owned by an individual debtor, subject to no trust resting on the artificial character of the debtor entity."

Hall vs. Henderson, 134 Ala. 455; 32 So. 840; 63 L. R. A., 673.

The principle that equity will not take jurisdiction to prevent a multiplicity of actions unless there is some recognized ground of equitable cognizance is ably sustained by the Supreme Court of Mississippi in an opinion by Justice Campbell, in Tribbette, et al vs. Illinois Central Ry. Company, 19 L. R. A., 660.

The liability of stockholders is several and not joint and in a suit by a receiver to recover the amount due from stockholders of an insolvent bank, where the whole amount is sought to be recovered the action must be at law. Where less is required the suit may be in equity.

Kennedy, Receiver vs. Gibson, et al, 8 Wall 498, 19 Law. Ed. 476.
Casey vs. Galli, 4 Otto, 673, 24 Law Ed. 168.

"Equity has here nothing to act upon. There is no community of interest no marshaling of

assets, no distribution. The case involves no one subject of equity jurisdiction. It is a simple question of liability of one party to the other. The remedy at law is all sufficient to the occasion."

Flour City Bank vs. Wechselberg, 45 Fed. 547.
Young vs. Wempe, et al. 46 Fed. 354.
Aver, et al vs. Lombard, et al. 72 Fed., 209.
Alderson, et al. vs. Dole, et al. 74 Fed. 29.
Hollins vs. Brierfield Coal & Iron Co., 150 U. S. 371 37 L. Ed. 1113.

A claim which is purely legal, involving a right to a trial at law before a jury cannot be made the basis of relief in equity.

Swan Land & Cattle Co. vs. Frank, 148 U. S. 603.
37 Law Ed. 577.
Hawkins vs. Glenn, 131 U. S., 319.

The liability of a stockholder for unpaid subscription is contractual, and a right of action to enforce payment is legal and not equitable.

Anglo American Land Mortgage and Agency Co., vs. Lombard (CCA) 132 Fed. 721, 68 C. C. A., 89.
Hale vs. Allison, 102 Fed. 790.
Hale vs. Allison, 106 Fed. (CCA) 258.
Hale vs. Allison 188 U. S. 56.
Medberry vs. Troutman, 94 Fed. 952.

The case of Tompkins vs. Craig, et al., 93 Fed. 885, is directly in point. Judge McPherson there

held that a receiver of an insolvent Iowa bank could not maintain a suit in equity against a ~~member~~ number of stockholders to recover assessments levied under a state Statute, as the liability of the stockholders was several, arising out of the contracts of subscription, each of which constitutes a separate obligation, which is a legal and not an equitable liability. The doctrine stated by Judge McPherson is sound. It can result in no detriment to the receiver or any creditor of the corporation, and preserves the legal rights of the subscribers.

In the case of Wyman vs. Bowman, 127 Fed., 257, Judge Sanborn, with whom concurred Judges Van Devanter and Hook, sustained a bill in equity to collect the unpaid stock subscriptions of nine several defendants, but in this case the subscribers had all signed one agreement, and all defended upon the same grounds and the suit was sustained on the grounds that it came within the doctrine that equity will intervene to prevent a multiplicity of suits, where "The defendants have a common interest in every material question of law or of fact involved in the controversy of this suit."

In suits such as the one above was found to be, and in all suits maintained on this doctrine it is clear that the suit must stand or fall as to each and every defendant on the same grounds, the result must be

the same as to all. It is the community of interest in each and every question, both of law and of fact, that authorizes a court of equity to take jurisdiction and deal with all in the same proceeding. But such is not the status of the instant case. No one of defendants has any interest in the defense of any other one. There is no community of interest in any question presented. On the trial as shown by the record only two of the defendants were heard, and one sustained his defense, the other plead payment and was defeated. Each one has a separate, several, individual defense, which in effect operates to defeat the theory of the bill, and to support the contention of the plaintiff in error that the bill is multifarious, containing five separate, independent actions at law, each upon a separate personal obligation of the particular defendant.

The record shows that the plaintiff in error objected to having the issues determined without a jury, and objected to the conversion of an action at law into an equitable proceeding, whereby he was deprived of his constitutional right to a jury. The Courts of the State recognized his contentions in this particular and overruled them, to which he excepted. He raised the question first by demurrer to the bill, then by his plea and afterwards in his motion for new trial in the District Court, again he insisted upon his right in his assignment of error in the Supreme

Court of the State, in his brief before that Court, as is shown by the opinion of the Court, in his petition for re-hearing, and lastly in his assignment of errors in this Court. The determination of this right to a jury trial is dependent upon the one controlling question, viz: whether this is a law action or a suit in equity. Our position upon this question is as clearly and strongly stated in our petition for re-hearing in the State Court as we are able to make it, and we adopt the argument therein presented, and request its deliberate consideration as part of this brief.

This is not a proceeding to enforce the statutory or individual liability of stockholders. No such question is in the case. The averment is that each of the five defendants named in the bill had originally subscribed for a certain number of shares. That they had each failed to pay into the corporate treasury the amount so subscribed by him. That the corporation was insolvent; that the Court had appointed a receiver to take charge of its property and collect its choses in action for the benefit of its creditors. There is no averment of fraud—nothing in the nature of a trust, no charge of a diversion of funds or property of the corporation, but a plain suit on a contract of subscription to recover a money judgment. No demand for an accounting and no averment that in any degree or character charges any community of interest

in the several defendants, or any partnership combination, conspiracy, or other relationship by which the receiver has any right to proceed against them jointly or to enforce equitable remedies against them jointly or severally.

The Supreme Court of Oklahoma bases its decision in this case upon the doctrine that the assets of an insolvent corporation constitute a *trust fund* to be administered by a court of equity for the benefit of its creditors.

It is true this doctrine finds some support in some of the state courts, but in the courts where the reason for the doctrine has had careful, analytical, and logical consideration, it has been repudiated. That the choses in action of a corporation, whether solvent or insolvent, are simply assets of the corporation, and that the assets of a corporation do not ordinarily constitute a trust fund, is now settled by the best considered cases. One of the ablest and most scholarly decisions on this doctrine is by the Supreme Court of Alabama in O'Bear Jewelry Co. vs. Volfer, 106 Ala. 205; 28 L. R. A. 707; 17 So., 525, where Justice McClellan reviews the entire field of judicial decisions and conclusively shows that this doctrine has no place in our equity jurisprudence. We will not quote from this opinion, but respectfully invite its deliberate examination.

This case is expressly approved in the later cases by the same Court of

Covey vs. Wadsworth, 118 Ala. 488 25 So. 503; 44 L. R. A. 766 and
Hall vs. Henderson, 134 Ala. 455, 32 So. 840; 63 L. R. A. 673.

The doctrine of the Alabama Court has the express approval of this Court in the cases of Hollis vs. Brierfield Coal & Iron Company, 150 U. S. 371, 37 Law Ed. 113. This Court speaking by the late Justice Brewer said:

> "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto, but as between itself and its creditors, *the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor.*" That is certainly the general rule, and, if there be any exceptions thereto, they are not presented in this case, neither the insolvency of a corporation, nor the execution of an illegal trust deed, *nor the failure to collect in full all stock subscriptions,* nor all together gave to these simple contract conditions any lien upon the property of the corporation, nor charged any direct trust thereon."

The Supreme Court of Minnesota in an instructive opinion by Justice Mitchell in Hospes vs. Northwestern Mfg. & Car Co., 48 Minn. 174; 15 L. R. A.,

470, repudiates the idea that the property of an insolvent corporation constitutes a trust fund.

The Supreme Court of Michigan is also in harmony with this view.

> Bank of Montreal vs. J. E. Potts Salt & Lumber Co. 90 Mich. 345.

But we think we need only cite this Court to its own well defined rule upon the question here submitted. In Hale vs. Allison, 188 U. S. 56, 47 L. Ed. 380, this Court had under consideration a question so similar that the ruling in that case should be controlling here. The State Court after having this case urged upon its attention, both in our original brief and on petition for rehearing, did not consider it of sufficient importance to give it notice.

In discussing the question of jurisdiction of a court of equity in a case where the plaintiff seeks in one suit to recover from a number of stockholders of a corporation, the Court, speaking by the late Justice Peckham, said:

> "We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of rights or interest in the subject-matter among such defendants, *but where there*

is a community of interest among them in the questions of law and fact involved in the general controversy.

"Is there, upon the complainants theory of this case, any such common interest among these defendants as to the questions of fact that may be put in issue between them and the plaintiff? Each defendant's defense may, and in all probability will, depend upon totally different facts, upon distinct and particular contracts, made at different times, and in establishing a defense, even of like character, different witnesses would probably be required for each defendant, and no defendant has any interest with another.

"In this case from the complainant's own bill, the amount demanded is the full amount of the par value of the shares held by each defendant. In Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. Ed. 476, 478, a receiver brought suit to recover from the stock-holders of an insolvent national bank the statutory liability imposed upon them, and in course of the opinion it was stated by the Court:

" 'Where the whole amount is sought to be recovered the proceedings must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for further action of the Court, if such action should subsequently prove to be necessary, —until the full amount of the liability is exhausted." '

"In Bailey v. Tillinghast, 40 C. C. A. 93, 99 Fed. 801, this statement of the law was recognized, and the cases of Casey v. Galli, 94 U. S.

673, 24 L. Ed. 168, and United States v. Knox, 102 U. S. 422, 26 L. Ed. 216, were referred to as recognizing the same rule. In United States v. Knox, the court reaffirmed the rule laid down in Kennedy v. Gibson, and one of those rules was that, when the whole amount was sought to be recovered, the proceeding must be at law.

"The facts surrounding the present case and the reasons for holding that they do not bring it within the principle of preventing a multiplicity of suits are so well stated in the opinion of McPherson, District Judge, in this case (102 Fed. 790), that we quote the same. After speaking of the alleged conclusiveness of the Minnesota decree upon the question therein decided, the judge continued:

"'There a different question arose for determination, namely: Can the assessment be lawfully enforced against the individuals charged therewith? And in this question the interest of each stockholder is separate and distinct. The bill asserts the conclusiveness of the Minnesota decree upon the defendants, so far as the necessity for the assessment and the amount charged against each stockholder are concerned. Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. Ed. 619, 20 Sup. Ct. Rep. 506. Assuming that position to be sound (and, if I do not assume it; if these questions are still open for determination, so far as the Pennsylvania stockholders are to be effected—the bill must fail for want of necessary parties), it is clear that only two classes of questions remain to be decided: The first is whether a given stockholder was ever liable as such; and the second is whether, if he were originally liable, his liability has ceased, either in

whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except there is a common plaintiff who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A to aver this his signature to the subscription list was a forgery; what connection has that averment with B's contention that his subscription was made by an agent who had exceeded his powers, or with C's defense that his subscription was obtained by fraudulent representations, or with D's defense that he has discharged his full liability by a voluntary payment to the receiver himself? or with E's defense that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each the defendant setting it up is entitled to a trial by jury, although it may be

somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law.

"We are in accord with the views thus expressed, and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits."

The facts shown by the record in this case, in our judgment, come squarely within the principle above announced, and we are entitled to the application of the rule there enunciated to the facts shown by the record herein. This rule is recognized and applied in Tompkins vs. Craig et al, 93 Fed. 885, Wyman vs. Bowman, 127 Fed. 257, Flash vs. Corn, 107 U. S. 371, 27 L. Ed. 966, Barcus vs. Gates, 89 Fed. 783, 32 C. C. A. 337.

In Baily vs. Tillinghast, the C. C. A. Sixth Cir-

cuit, 99 Fed. 801, followed the rule in Kennedy vs. Gibson, 8 Wall. 498, 19 L. Ed. 476, to the effect that when the suit is for a less amount than the par value of the stock, the suit may be maintained in equity, but when the entire amount is sought to be recovered the action must be at law.

CONTENTION OF DEFENDANT IN ERROR.

We presume that the position of counsel for defendant in error will be practically the same in this court as it was in the state court. We readily concede that creditors must sue in equity to recover from stockholders upon their unpaid subscription. This results from the fact that there is no privity between the creditors of the corporation and its stockholders, and, therefore, no legal action can be maintained by them upon the contract of subscription. Creditors, in such case, have no remedy at law and must resort to equity. But the corporation itself, or one standing in the place of the corporation, as does the receiver in the case at bar, can look to the contract of subscription and can maintain an action at law to recover the money due thereon. The cases all hold that where the whole amount is due, or where the sum due is fixed and certain, the receiver must sue at law and cannot proceed in equity.

Counsel for the defendant in error contended in the State Court that the "Trust Fund Theory" is applicable to the controversy here, and they cited a great many cases, which, they claim, support their theory. An examination of these cases will show that none of them sustain their contention. Many of their cases were suits by creditors and were, for the reason before stated, properly equity suits, and, therefore, not applicable to the question here; others prayed for an acounting, which can be had only in equity, and, therefore, are not in point here; while yet other cases cited by them are positively against their contention.

In the court below counsel for the defendant in error placed great reliance upon the case of Cook vs. Carpenter, 1 L. R. A. (N. S.) 902, and quoted from it at considerable length. That is a Pennsylvania case, and, as reported, in the original state report, will show that it was a suit brought for and on behalf of the creditors of the company against the holders of shares at the time of insolvency. The suit was brought by Richard V. Cook and George H. Earle, Jr., assignee for the benefit of creditors of the Savings Fund Company vs. Richard L. Carpenter and forty stockholders of the company. The attorneys for the plaintiff in that case, in their brief, an abridgment of which will be found in the State Reports, says:

"The present suit is not against subscribers upon their contracts of subscription but against the holders of shares at the time of the insolvency."

That was a very different kind of a case from the one at bar. It was a suit brought for and on behalf of creditors in the nature of a creditor's bill. It was not an action on the contract of subscription. The purpose of the suit was to enforce a liability of the shareholders to the creditors, and the only remedy available to the creditors in such a case, as heretofore pointed out was in a court of equity. The plaintiffs in that case represented the creditors the real parties in interest; there being no privity between the creditors the real parties in interest, and the shareholders of the company, an action at law would not lie, and the plaintiffs were compelled to resort to equity. There is no similarity between that suit and the one at bar.

The case of Fletcher vs. Bank, 69 S. W. 580, was also cited by the defendant in error. It is from the state of Arkansas, and was brought by the receiver of a bank and other creditors against the Bank of Lonoke and certain stockholders of the insolvent bank. The court at the opening of the opinion says: "The authority of the receiver to bring this action is not shown. We will treat it as brought by creditors."

Upon the theory that the suit was by the creditors of the bank, of course equity had jurisdiction.

All the cases from the state of Arkansas cited by counsel for the defendant in error were either suits by creditors, or prayed for an acounting, and, therefore, are not in point. All the cases from the Federal Courts, cited by them, were either suits by creditors, and therefore not in point, or are squarely against their contention. The case of Sanger vs. Upton, 91 U. S. 60, 23 L. Ed. 220, was an action at law brought by an assignee in bankruptcy against a stockholder for unpaid subscription; the case was tried to a jury and the form of the action was sustained. The case of Pott vs. Wallace, 146 U. S. 689 36 L. Ed. 1135, was an action at law by an assignee against stockholders for unpaid subscription; was tried to a jury and the form of the action was sustained. In the syllabus to the case it is said:

> "Where the whole amount of the stock subscription is required to pay debts, an assessment is not essential, and an assignee may sue at law a subscriber for the whole amount due on his stock."

It must follow that if the Court was without jurisdiction in equity in this cause, then the plaintiff in error was wrongfully deprived of his constitutional right to trial by jury, and the cause should be re-

versed and remanded, with directions to dismiss the bill.

That there has never been any waiver by the plaintiff in error of his right to a jury trial is apparent from the record. It was held in Warwick vs. Kingman, 2nd Ind. Ter. 435, that

> "Unless a trial by jury is waived, it is the duty of the court in all cases in which a party is entitltd to a jury trial to grant it, and a waiver of the right must affirmatively appear of record * * * In all cases where a right to a trial by jury is guaranteed by the Constitution of the United States, it is the duty of the trial Court to tender to the parties a trial jury with an open hand, and we are unwilling to approve any record where this right is seemingly refused or abridged."

This case was tried after Statehood, and pursuant to the procedure prescribed by the state in civil causes. The Statute then in force, Sec. 5808, Compiled Laws 1909, (Snyder) is as follows:

> "The trial by jury may be waived by the parties in actions arising on contract, and with the assent of the Court. In other actions, in the following manner: By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney, by the written consent, in person or by attorney, filed with the clerk. By oral consent in open Court, entered on the Journal."

There was no waiver in either of the methods here enumerated.

> "The right of trial by jury in the Courts of the United States is expressly secured by the seventh Article of Amendment to the Constitution, and Congress has by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury only when the parties waive their right to a jury by a stipulation in writing.
>
> "This Constitutional right this Court has always guarded with jealousy."
>
> Baylis vs. Travelers Ins. Co. 113 U. S. 316, 28 L. Ed. 989.
> Idaho Land Co. vs. Bradbury, 132 U. S. 515, 33 L. Ed. 437.

In any event, whatever practice prevailed at the time of the trial, a jury could only have been waived in writing or in open court entered of record, neither of which was done.

We believe we have covered all the questions which will reasonable suggest themselves, or are involved in the controversy presented by the record.

For the reasons above assigned, and upon the law cited, we respectfully submit that the judgment of the Supreme Court of Oklahoma, has deprived the plaintiff in error of a right guaranteed to him by the Constitution of the United States, which right

he asserted and claimed at each step in the proceedings, and should be reversed, and the cause remanded to the State Court, with directions to dismiss the bill.

JOHN H. BURFORD,
FRANK B. BURFORD,
Attorneys for Plaintiff in Error.

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In the
SUPREME COURT OF THE UNITED STATES,
October Term, 1912.

No. 191.

WILLIAM H. DILL, ***Plaintiff in Error,***

vs.

WILLIAM H. EBEY, Receiver of the Citizens Bank & Trust Company, of Stonewall,
Defendant in Error.

STATEMENT

The plaintiff in error and his co-defendants in the court below were the promoters and incorporators of the Citizens Bank and Trust Company of Stonewall, Indian Territory. This financial institution was organized at Okemah, Indian Territory, on or about the 14th day of March, 1905, with an authorized capital stock of twenty-five thousand dollars, of which ten thousand was represented to have been paid in cash. On the 17th day of February, 1906, when the defendant in error, as receiver, took charge

of its assets he found some twenty-five cents in the till and some banking furniture and fixtures of the probable value of $500.00, and liabilities of the corporation amounting to upward of fifteen thousand dollars.

The defendant in error was appointed receiver by the United States Court for the Southern District of the Indian Territory, sitting at Ada, at the suit of the Union National Bank of Kansas City, Missouri, one of the creditors of the Citizens Bank and Trust Company, of Stonewall. Upon a showing by the receiver of the condition of the estate of the insolvent corporation and that its incorporators had probably not paid for their stock as had been represented by them, the United States Court for the Southern District of the Indian Territory passed an order authorizing the receiver to retain counsel and institute proceedings against the incorporators and promoters for the recovery of the unpaid subscription to the capital stock of the corporation for the benefit of all its creditors. This suit was instituted in pursuance of said order. It was filed in the United States Court for the Western District of the Indian Territory, sitting at Okmulgee, this being the nearest court town to the places of residence of the defendants. After statehood and the organization of Okfuskee County, the case was transferred to Okemah, the home of the plaintiff in error, and on his motion. When the case was called for trial, only

two of the defendants announced ready and it was tried as to them, resulting in judgment in favor of one and against the other for the par value of his stock in the Citizens Bank and Trust Company, and interest thereon.

This suit was instituted on the equity side of the docket by the receiver, an officer of the court appointed for the purpose of collecting and conserving the assets of the insolvent corporation for the benefit of all its creditors, against the defendants as incorporators and promoters of the insolvent corporation on the violated obligation which they had severally and jointly assumed by falsely representing in the articles of incorporation, sworn to by each, that they had paid for the capital stock assigned to each, and that they had joined together with the fraudulent intent and purpose of promoting the corporation without paying in the capital stock, as represented by them, on the theory that the purpose and intent of the defendants, as promoters and incorporators, was to perpetrate a fraud upon the public and the creditors of such corporation, and on the further ground of the inadequacy of the legal remedy and to avoid a multiplicity of suits, and that the capital stock of a corporation constitutes a trust fund to which creditors may resort for the satisfaction of their claims in the event of insolvency. (Rec., pp. 8-9-10.)

The Law and Procedure

The counsel for plaintiff in error seem to assume, if they do not openly assert throughout their brief, that the courts in the Indian Territory being designated as United States Courts, were federal courts and governed by the practice and procedure prevailing in the *nisi prius* federal courts in general. This assumption is confusing and altogether misleading. The first United States Court was established in the Indian Territory by the Act of March 1st, 1889. (25 Stat. at L. 783.)

Section 6 of said act provides in part as follows:

> "That the court hereby established shall have jurisdiction in all civil cases between the citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any state or territory therein, and any citizen of or person or persons residing or found in the Indian Territory, and when the value of the thing in controversy, or damages or money claimed shall amount to one hundred dollars or more * * * and said court shall have jurisdiction over all controversies arising out of said mining lease or contract and of all questions of mining rights or invasions thereof where the amount involved exceeds the sum of one hundred dollars.
>
> That the provisions of chapter eighteen, title thirteen, of the Revised Statutes of the United States shall govern such courts, so far as applicable; *provided*, that the practice, pleadings, and forms of proceedings in civil causes shall conform, as near as may be, to the practice,

pleadings and forms of proceeding existing at that time in like causes in the courts of record of the State of Arkansas, any rule of court to the contrary notwithstanding; and the plaintiff shall be entitled to like remedies by attachment or other process against the property of the defendant, and for like causes, as now provided by the laws of said state."

This court was a court of limited jurisdiction. Federal jurisdiction over the Indian Territory, in certain cases, was vested in the United States Court for the Eastern District of Texas and the Western District of Arkansas.

By section 29 of the Act of May 2nd, 1890 (26 Stats. at L. 81), the jurisdiction of the United States Court in the Indian Territory was extended.

By section 31 of this act certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that state of 1883, as published in 1884, in Mansfield's Digest of the Statutes of Arkansas, were extended over and put in force in the Indian Territory, among these general laws of the State of Arkansas thus extended and put in force in the Indian Territory was chapter one hundred nineteen entitled "Pleading and Practice". From the date of the adoption of this act until the Indian Territory merged into the State of Oklahoma on the 16th day of November, 1907, the pleadings and practice in the United States Courts of the Indian Territory was that of the State of Arkansas and not the pleading and practice prevailing

in the federal courts generally. The Supreme Court of Oklahoma has held that in extending these statutes of Arkansas over the Indian Territory, Congress will be presumed to have extended them with the construction and interpretation that had been placed on them by the Supreme Court of Arkansas prior to their adoption. *National Live Stock Commission Company* v. *Taliaferro, et al.*, 20 Okla. 177.

The United States Court of Appeals for the Indian Territory announced the same rule in *Zufall* v. *United States*, 1 Ind. Ty. 639.

The United States Circuit Court of Appeals for the 8th Circuit approved the same rule in *Sanger* v. *Flow*, 48 Fed. 152, 1 C. C. A. 56.

This being true, the proceedings had in the instant case in the trial courts and assigned as error, must be tested by the rules of pleading and practice under the laws of the State of Arkansas, extended over the Indian Territroy and as construed and interpreted by the Supreme Court of Arkansas.

The Right to a Jury Trial

It is contended on behalf of the plaintiff in error that the one question for the court to determine in this cause is: Was the plaintiff in error entitled to a jury trial? However, if this question should be answered by the court in the affirmative, the further question arises, namely: Was this right improperly denied him?

We shall not deny that the 7th amendment to the United States Constitution was in force in the Indian Territory when this suit was commenced and that this amendment provides that the right to a jury trial in suits at common law where the value in controversy exceeds twenty d o l l a r s shall be "preserved."

We insist, however, that the instant case was not a "suit at common law," but was a suit in equity and therefore the amendment does not apply to this case and has nothing to do with it.

If it should be conceded for the purposes of the argument that this suit was one at common law, we should still insist that the right to a jury trial was "preserved" to the plaintiff in error by the proceedings had in the trial courts since he did not make proper application to the courts to obtain or to avail himself of this right; that when he might have had a jury trial if he were entitled to it, in the District Court of Okfuskee County, he failed to ask for it, and proceeded to trial before the court and t h e r e b y waived the right to a jury if he had one and did not complain until after the court had decided against him. His first objection was by way of demurrer to the bill, which reads as follows:

> "Comes now the defendant, W. H. Dill, and demurs to the plaintiff's complaint and for grounds says, that said complaint does not state any sufficient facts to authorize a court of equity

to assume jurisdiction; that said complaint shows upon its face that the plaintiff has a plain, adequate and complete remedy at law.

And for further reason this defendant is entitled to a trial by a jury under the laws and Constitution of the United States of which this defendant would be deprived should this cause be tried in equity.

And for the further reason this court had no jurisdiction in equity to hear and determine the said cause.

Wherefore defendant prays that the complaint be dismissed for want of equity." (Rec., p. 14.)

The Statutes of Arkansas (Sec. 5028 Mansfield's Digest) reads as follows:

"*Sec. 5028.* The defendant may demur to the complaint where it appears on its face, either:

First. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

Second. That the plaintiff has no legal capacity to sue; or,

Third. That there is another action pending between the same parties for the same cause; or

Fourth. That there is a defect of parties, plaintiff or defendant; or

Fifth. That the complaint does not state facts sufficient to constitute a cause of action."

The United States Court at Okmulgee in which the suit was commenced and the foregoing demurrer presented, was a court of general jurisdiction, having both common law and equity jurisdiction, actions at law going to one side of the docket and suits in equity to the other; the same court had jurisdiction in both classes of cases. The objection raised by the demurrer that the court had no jurisdiction was not properly raised. If the suit was improperly on the equity docket it should have been transferred to the law docket upon motion. The court of the Indian Territory, following the decisions of the Supreme Court of Arkansas, was extremely liberal in construing pleading as between action at law and suits in equity. A mistake in getting your case on the law side of the docket when it should have been on the equity side did not put you out of court or end the litigation. On motion of either party, or the court, of its own motion, might transfer the case to the right side of the docket, but if this was not done the court took the case and administered justice therein the same as if it had been filed on the right side of the docket. The United States Court of Appeals for the Indian Territory in *Rogers* v. *Nideffer*, 5 Ind. Ty. 55, in the fourth paragraph of the syllabi says:

> "When in an action at law, the answer sets up equitable defenses; the case may be transferred to the equity side of the docket; but if it is not so transferred on motion or otherwise, the court will try the case in accordance with the principles involved, either legal or equitable as set up in the pleadings."

In *Hampton* v. *Mays*, 3 Ind. Ty. 65, the first and fourth paragraphs of the syllabi are as follows:

> "*1. Promissory Note—Procedure—Change of Action.* In a suit originally instituted to recover upon a promissory note, it is not error to allow plaintiff to abandon his rights of recovery upon the note and sue upon the original transaction, changing the action from one at law to one in equity, and transferring it to the equity docket; for such procedure is authorized by Mansfield's Digest, Sec. 4925 (Ind. Ter. Stat., Sec. 3130). And such a procedure does not cause a dismissal of the action, but merely a change into the proper proceedings and a transfer to the proper docket."
>
> "*4. Procedure—Transfer to Equity Docket.* The transfer of a suit from the law to the equity docket is proper where the action is one based upon a note materially but innocently altered after its execution."

In *Sparks* v. *Childers*, 2 Ind. Ty. 187, the third and fourth paragraphs of the syllabi read as follows:

> "*3. Pleading and Practice—Action Not Abated by Being Brought on Wrong Side of Docket.* Under paragraphs 4925, 4928, Mansfield's Digest, an action is not abated or dismissed by being brought on the wrong side of the docket and in the absence of a motion to transfer the cause to the proper docket, the error is waived and the court should proceed with the cause in accordance with the principles set up in the pleadings."
>
> "*4. Complaint—Not Demurrable if Cause of Action Stated.* If a complaint states a cause

of action either equitable or legal, it is not demurrable, no matter how the action is brought, whether in equity or at law."

The Supreme Court of Oklahoma in *Choctaw, O. & G. Ry. Co.* v. *Burgess et al.*, a case pending in the United States Court of Appeals for the Indian Territory and transferred to the Supreme Court of the State of Oklahoma under the provisions of the Enabling Act (21 Okla. 653), the 6th paragraph of the syllabi is as follows:

> "*Pleading—Misjoinder of Action in Indian Territory.* And under the rule in force in the same jurisdiction, where two causes of action are imperfectly stated in the complaint or petition, and it can not be determined whether or not there is a misjoinder of causes of action, the remedy was by motion to require the plaintiff to make its complaint or petition more definite and certain and then, if it appeared that there was a misjoinder of such causes of action, the point should have been taken advantage of by motion.
>
> The case of *Indian Land and Trust Company* v. *Shoenfelt*, 135 Fed. 484, cited in plaintiff in error's brief is an authority on this question of practice in the United States Court for the Indian Territory. The cause was reversed by the United States Court of Appeals for the reason that the trial court failed to follow the rule contended for herein."

These authorities, we insist, sustain the proposition that the plaintiff in error's demurrer did not properly raise the objection that the suit was one at

law and not in equity and the overruling of the demurrer by the United States Court at Okmulgee was not error.

Again when the cause was transferred to the District Court of Okfuskee County, Oklahoma, after statehood, it was then pending in a court where the difference in the forms of action at law and suits in equity did not exist. In Oklahoma there was but one form of action called "a civil action." Section 5542, Compiled Laws of Oklahoma, 1909, reads:

> "*Form of Action.*—The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action."

The provisions of the Oklahoma statute in regard to trials are as follows:

> "SEC. 5785. *Issues—How Tried—Law.* Issues of law must be tried by the court unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."
>
> "SEC. 5786. *Issues—How Tried—Facts.* All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury, or referred as provided in this code."

"SEC. 5787. *Separate Trial.* A separate trial between the plaintiff and any or all of several defendants may be allowed by the court, whenever justice will be thereby promoted."

The provisions of the Arkansas Statute governing trials in the Indian Territory prior to statehood are very similar. (Mansfield's Digest.)

"*Sec. 5105.* Issues of law must be tried by the court. Issues of fact, arising in actions by proceedings at law for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived."

"*Sec. 5106.* All other issues of fact, whether arising in proceedings at law or equitable proceedings, shall be tried by the court, subject to its power to order any issue or issues to be tried by jury."

Assuming that the plaintiff in error is correct in his contention that the instant case was a common law action and that his right to a trial by jury was preserved to him by the 7th amendment to the Constitution of the United States, the procedure in the State of Oklahoma where the case was tried and in the Indian Territory where it was commenced provided for a waiver of this right of a trial by jury. It will be observed that neither statute provides for a waiver of the right in writing or in any particular form, but both give the right unless it is waived.

It is contended by the plaintiff in error that his right in this respect was fixed by the law and pro-

cedure in the Indian Territory and preserved by the schedule to the Constitution of Oklahoma. We think this incorrect. In this view of the question the construction of the statute by the Supreme Court of Arkansas prior to the time it was extended over the Indian Territory by the Congress is controlling. The Supreme Court of Arkansas had construed this statute prior to its adoption for the Indian Territory and held that the right to a jury trial might be waived by conduct in failing to demand such a trial as well as by stipulation in writing.

> "Where the parties have appeared and dispensed with the jury, it is the more correct practice to require them to sign a stipulation in writing to that effect, or to let the records show an express waiver. But in the absence of an affirmative showing in the bill of exceptions that a jury was demanded and refused a judgment will not be reversed for such a cause."
>
> *Chapline* v. *Robertson*, 44 Ark. 205-206.

Again, the Supreme Court of Arkansas says:

> "Conceding, without deciding, that the defendant in this case had a constitutional right to a trial by jury of an issue of fact, it is sufficient to say that he waived it by voluntarily submitting to a trial of all the issues by the court sitting in equity, without making an effort to obtain a jury trial."
>
> *Love* v. *Bryson*, 57 Ark. 594.

We contend under these authorities that the plaintiff in error waived his right to a jury trial, even if he were entitled to it, by not demanding a jury

when the case was called for trial in the District Court of Okfuskee County and by proceeding to trial before the court without a jury. (Transcript, p. 16.)

The force of the foregoing decisions from the Supreme Court of Arkansas are in no way weakened by the decision of the United States Court of Appeals for the Indian Territory, in *Warwick* v. *Kingman*, 2 Ind. Ty. 435, cited in plaintiff in error's brief. In that case it affirmatively appears that the complaining party was at all times insisting on his right and demanding a jury and refused to introduce testimony at the trial for the reason that a jury trial was refused. The opinion of the court recites, page 436, that the bill of exceptions presented to the trial judge for allowance recited: "Mr. Hocker: Objecting to the way and manner of proceeding herein, and not waiving the right to a jury trial, and still demanding a jury, we do not c a r e to introduce any testimony." While in the instant case the plaintiff in error voluntarily proceeded to trial before the court without demanding a jury. It is true that he raised this question in his motion for a new trial (Transcript, page 25), and it is also true that that was the first time he raised that question in that court—the District Court of Okfuskee County—and this was after he had voluntarily submitted to a trial before the court without a jury and after the court had found against him.

We respectfully submit that it does not appeal to the sense of justice and fair dealing that the plaintiff in error should voluntarily take his chances in a trial to the court without a jury, as the record shows he did so, and when disappointed at the result undertakes to escape its consequences by asserting that he had not waived in writing the jury, when established contained no such requirement, and permitted waiver to be inferred from conduct.

The Supreme Court of Oklahoma has announced a just and fair rule on this question. The second paragraph of the syllabi, in the case of *Alcorn* v. *Dennis*, 25 Okla. 135, reads as follows:

> "*2. New Trial—Objection at Trial—Necessity—Waiver of Jury.* A party, prior to the beginning of a trial, having duly waived a jury, and during such trial an amendment at the instance of the opposite party having been permitted, no request by either party having been made to the court for the withdrawal of the waiver as to trial by jury, but the trial having proceeded to judgment, such party will not be thereafter heard to complain for the first time in his motion for a new trial that he had been thereby deprived of a right of a trial by jury."

Jurisdiction of This Court. No Federal Question in This Case

We respectfully suggest that no federal question is preserved in or presented by this record upon which the jurisdiction of this court can be properly rested. The questions raised in the record and discussed in the brief are questions of pleading and practice. These are to be settled under the rules of pleading and practice prevailing in the Indian Territory. The controlling decisions on these questions are those of the Supreme Court of Arkansas, not the rules of pleadings and practice prevailing generally in the federal courts or the decisions of those courts. For these reasons, it is apparent, that the case of *Hale* v. *Allison*, 188 U. S. 56, so much quoted by the plaintiff in error, is not a controlling decision in the instant case. The Supreme Court of Oklahoma, in its decision, clearly distinguishes the cases relied upon by plaintiff in error and the controlling decisions in this case (Rec., pp. 60, 61) as follows:

> "In those cases the receiver appointed by the court to wind up the affairs of the respective corporations represented the corporations in the suits in which they appeared as parties. In the complaint herein there is an allegation to the effect, that on a showing made to the judge who appointed the receiver that the corporation was entirely insolvent and that there would be no funds arising from the sale of its assets for distribution amongst the stockholders, he directed the receiver to retain counsel and institute

proper proceedings against the defendants as subscribers of the capital stock of said Citizens Bank & Trust Company, to recover the respective amounts remaining unpaid on said subscription or for the stock issued to them, for the benefit of all the creditors of the Citizens Bank & Trust Company, and that this suit was filed in compliance with said order. It seems to us the foregoing allegation brings the instant case within the rule laid down in *Fletcher et al* v. *Bank of Lonoke et al.*, 71 Ark. 1, 69 S. W. 580. That was an action commenced by the receiver and other creditors for the use of German National Bank and certain other creditors of the Bank of Lonoke, against the latter bank, C. W. Englad and other stockholders thereof, to recover so much of the stock of such shareholders as remained unpaid. BATTLE, J., in discussing the jurisdiction question raised, says: 'The authority of the receiver to bring the action is not shown. We shall treat it as brought by creditors.' And on that ground sustained the jurisdiction of the court. Counsel for plaintiff in error, in distinguishing the Arkansas case from the case at bar, quoted the foregoing statement by the judge who delivered the opinion for the court, and say: 'Upon the theory that the suit was by creditors of the bank, of course equity had jurisdiction.' These cases seem to be similar, in principle at least. The Arkansas suit was instituted for the use of the German National Bank and certain other creditors of the Bank of Lonoke, and this, by positive direction of the court, was commenced by the receiver for the benefit of all the creditors of the Citizens Bank & Trust Company, the insolvent corporation, after it was made to appear that the assets of the bank were entirely inadequate to pay the

creditors. In *Lanigan* v. *North,* 69 Ark. 62, it was held that a liability created against the stockholders of a banking corporation may be enforced by a creditor in the courts of that state at law as well as in equity, and this notwithstanding it was held that, 'the statute definitely fixes the proportion of each debt or claim for which the stockholder is liable.' As the laws of Arkansas were in force in the Indian Territory at the time the obligation herein was incurred and this suit commenced, the decisions of the Supreme Court of that state, although rendered after said laws were put in force in said territory, are entitled to great weight."

The reason given by the Supreme Court of Oklahoma, as set out in the above excerpt, is sound and cannot be successfully assailed. Under the practice prevailing in the State of Arkansas, suits to recover unpaid subscriptions to capital stock of an insolvent corporation when brought on behalf of creditors and for their benefit are properly brought on the equity side of the docket. The same practice prevailed in the Indian Territory when the case at bar was commenced and this being a suit against the promoters of an insolvent corporation for unpaid subscription upon capital stock and the suit having been brought by an officer of the court and upon the express order of the court for the benefit of creditors was properly brought on the equity side of the docket.

The Supreme Court of Arkansas, in *Jones* v. *Jarman,* 34 Ark. 323, announce the rule as follows:

"While the instant case appears to be one to collect unpaid subscriptions to the capital

stock of an insolvent corporation, still there is no subscription list in the record. The defendants are sued on the implied obligation to pay for the number of shares which they represented had been assigned to each and that each owned as set out in the articles of incorporation filed. The law imposed upon each of these defendants an obligation to pay for the stock assigned him. It was this obligation that each of the defendants breached by failing to pay, and became liable to suit.

The enforcement of this obligation to pay for capital stock is in equity and not in law."

Other cases in that court sustaining the same doctrine are:

Carter v. *Union Printing Co.*, 54 Ark. 576;
Lester v. *Halton Bennes Lumber Company*. 74 Ark. 518;
Lanigan v. *North*, 69 Ark. 62;
Fletcher v. *Bank*, 69 S. W. 580.

Under the law in force in the Indian Territory at the time of the appointment of the defendant in error as receiver of the insolvent company he was vested with full title to the property of the company, including its choses in action. Section 5283 of Mansfield's Digest, which is a part of chapter 119, extended over the Indian Territory by Act of Congress May 2nd, 1890, reads as follows:

"Whenever, in any case, a receiver shall be appointed for a corporation or the trustee thereof, or any co-partnership or joint stock com-

pany, and the order or decree of the court, judge or chancellor shall be that the lands, tenements, goods, chattels, funds, assets, moneys, credits, choses in action, rights and interests of every kind, name and nature, either in law or equity, or any part thereof, belonging to the same, shall be placed in the hands of such receiver, he shall from thenceforward, until the further order or decree of the court, judge or chancellor, have full possession, custody and control thereof, and shall be vested with the title, so far as it shall be necessary to collect debts, preserve the assets and property for the benefit of creditors and all persons interested, and may and shall bring and prosecute and defend all suits in his own name that may be necessary for that purpose."

The jurisdiction in equity of suits against stockholders to collect unpaid subscription to capital stock is not peculiar to the practice and proceedings in the State of Arkansas and the Indian Territory but is recognized and followed in other jurisdictions, both state and federal.

The United States Circuit Court of Appeals for the Eighth Circuit in sustaining the right of a receiver of an insolvent corporation to maintain a suit in equity against subscribers to the capital stock said in part:

"If, however, the concession were made that the complainant could have maintained nine separate actions at law—one against each of the nine defendants in this suit—and one could in those actions have disregarded the releases and assignments, and have recovered the entire 50

per cent alleged to have been unpaid upon the subscription, nevertheless the community of interest of the defendants in every question of law and of fact involved in the controversies presented by this suit, the inadequacy of the nine separate actions at law to attain the ends of justice, the greater convenience and less expense for all parties in the determination of the controversies here presented in a single suit in equity, are in themselves sufficient to sustain the jurisdiction of the court below on the ground that this suit avoids a multiplicity of actions at law. In support of the counter proposition, counsel for the defendants cite *Hale* v. *Allison*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380, in which the Supreme Court sustained the dismissal of a bill in equity brought by a receiver against 47 stockholders to enforce their double liability for the debts of the corporation, which was imposed by the Minnesota statute, upon the ground that the liability of each stockholder was separate and independent, and was to the creditors only, and that the convenience of the complainant in enforcing their liability by a single suit was overcome by the greater inconvenience that would be entailed upon the defendants by such a course of proceeding, in view of the fact that they were supposed to have different defenses to the alleged causes of action against them. The decision in that case is not conclusive here, because that was a suit to enforce a liability beyond the amount of the subscription to the stock, imposed by statute in behalf of creditors only. This is a suit to enforce the payment of subscriptions to the stock of the corporation for the purpose of paying the corporate debts.

In that case the liability was directly to the creditors, and they alone, or their representa-

tive could maintain an action to enforce it. In this case, the liability is to the corporation for the benefit of the creditors *(Patterson* v. *Lynds,* 106 U. S. 519, 520, 521, 1 Sup. Ct. 432, 27 L. ed. 265; *Van Pelt* v. *Gardner,* 54 Neb. 711, 75 N. W. 874), and any shareholder who pays more than his proportion of the corporate debts may enforce contribution of his co-subscribers *(Van Pelt* v. *Gardner,* 54 Neb. 711, 75 N. W. 874). This fact alone presents a persuasive argument in support of a remedy by a single suit in equity. In that case there was no community of interest among the defendants in the controversies presented for litigation, and the convenience of the complainant in pursuing the single suit was overcome by the inconvenience of such a course to the several defendants. In this case there is a community of interest among the defendants in every question of law and of fact presented by the controversies, and the convenience of all parties will be better served by a determination of them here in a single suit, than by repeated decisions of them in nine separate actions at law. * * *

This court has repeatedly held—and that holding is sustained by the great weight of authority—that a bill in equity against several defendants separately liable either at law or in equity, may be maintained in order to avoid a multiplicity of actions at law or of suits in equity, whenever there is a common and decisive point of litigation between the complainant and the defendants, the complainant has no remedy at law as prompt, practical and efficient to attain the ends of justice as the suit in equity, and the convenience of the complainant in pursuing the single suit in equity is not overcome by the deeper inconvenience of such a course to the

defendants. *Prentice* v. *Duluth Storage Co.*, 58 Fed. 437, 7 C. C. A. 293; *Kelley* v. *Boettcher*, 85 Fed. 55, 65, 65, 29 C. C. A. 14, 23; *Curran* v. *Campion*, 85 Fed. 67, 70, 29 C. C. A. 26, 29; *Watson* v. *Bonfils*, 116 Fed. 157, 159, 53 C. C. A. 535, 537; *Bailey* v. *Tilinghast*, 40 C. C. A. 93, 99, 99 Fed. 801, 807; *Mayor of York* v. *Pilkington*, 1 Atk. 282; *Lord Tenham* v. *Herbert*, 2 Atk. 483; *Louisville, N. A. & C. Ry. Co.* v. *Ohio Valley Improvement & C. Co.*, (C. C.) 57 Fed. 42, 45; 1 Pomeroy's Eq. Jur., sec. 269; *Osborne* v. *Wisconsin Central Ry. Co.*, (C. C.) 43 Fed. 824, 826."

Wyman v. *Bowman et al.*, 127 Fed. 257, 258.

We suggest that the reason given by the Circuit Court of Appeals why *Hale* v. *Allison* was not a controlling authority in the above case is a full and complete answer why it is not a controlling authority in the instant case, namely, *Hale* v. *Allison* was a suit to enforce a liability beyond the amount of the subscription to the stock, imposed by statute in behalf of creditors only.

The leading case from a state court supporting the decision of the Supreme Court of Oklahoma, is that of *Cook, Receiver*, v. *Carpenter et al.*, 212 Pa. 165, from the Supreme Court of Pennsylvania. That court, in its opinion, answers fully and completely every objection made against the decision appealed from, Chief Justice MITCHELL, speaking for the court, in part, said:

"The preliminary question is the jurisdiction in equity. Appellants insist that there is

a plain, full and adequate remedy at law by suits against the several stockholders defendant, where each can defend upon his own case, untrammeled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable, but is it a full and adequate remedy in the sense that it bars the jurisdiction of equity? The subject of the controversy is the collection and administration of corporate assets as a trust fund for the benefit of corporate creditors. Both the control of corporate matters and trust funds are in general the subject of equitable jurisdiction. As was said in *Lane's Appeal*, 105 Pa. 49, 65, 51 Am. Rep. 166: 'When insolvency and exhaustion of assets (of corporations) exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors. Hence whether the proceedings originate in the name of one, or of several, or of all the creditors, the result is the same in each. The capital when recovered, inures to the benefit of all, and must be distributed among all ratably.' This result as to collection, and still more forcibly as to distribution, is not reasonably practicable, except in equity. A bill may be filed, as in this case, by assignees representing the corporation for the benefit of creditors, or as in *Lane's Appeal, supra*, by creditors, in their own names in behalf of themselves and others. In the latter case an action at law would present insuperable difficulties, and yet the substantial controversy is the same, and the mere difference in the nominal complainant should not oust in one case the jurisdiction that must be sustained in the other.

It is earnestly argued by appellants that in all the cases where a bill has been sustained an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground alone, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true the necessity for an accounting is a large and influential element in equitable relief; but we do not find it said in any of the cases that its presence or absence is the conclusive jurisdictional fact. In the present case, the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the averments and thus made the necessity of an accounting and assessment an issue; that would at once have made the case one cognizable in equity. *Citizens & M. Sav. Bank & T. Co.* v. *Gillespie*, 115 Pa. 564, 9 Atl. 73, was an action at law in which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for the payment of debts, or only part, and, if so, how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees, some stockholders defendant might have to pay their subscriptions in full, while some paid only part, and others, perhaps, nothing at all. This would be incurring certain inconvenience and quite probable injustice, where the relief should not only be certain, but uniform. As was well said by the learned judge below: 'There are more than forty defendants. Most of them live within the jurisdiction; some do not; and it is quite conceivable that there

might be hundreds living without the jurisdiction, not reachable by our process at law. The question involved in all the cases is substantially the same, namely: Ought the corporation to collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any. If, on the other hand, it should be collected, then none should escape.'

In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable in common law forms. When later the legislature granted equitable powers, it was held that if the subject of a bill was one within the proper and established jurisdiction of chancery, the invention of a new remedy in common law form, or the extension of an old one, would not necessarily oust the equitable jurisdiction. *Wesley Church* v. *Moore,* 10 Pa. 273.

The question in such cases turns on the completeness, adequacy and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements. *Kirkpatrick* v. *McDonald,* 11 Pa. 387; *Bierbower's Appeal,* 107 Pa. 14; *Brush Electric Co.'s Appeal,* 114 Pa. 547, 7 Atl. 794; *Johnson* v. *Price,* 172 Pa. 427, 33 Atl. 688; *Gray* v. *Citizens Gas Co.,* 206 Pa. 303, 55 Atl. 988. In the last case, it was said by our Brother Dean: 'The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has; but whether, in view of the facts, it is an adequate one. It may be conceded that the time is not very remote in our judicial history, when a wronged party sought the intervention of equity, and he could be truthfully met by the re-

ply, "You have a remedy at law in action for damages;" such reply would have been the end of this bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction; courts now go further, and inquire whether, under the facts, the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of.' Testing by this standard the numerous actions that would be required at law and comparing that remedy with the superior certainty, uniformity and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction."

Richard Y. Cook et al., Assignee, etc., of Chestnut St. Trust and Saving Fund Company, v. *Richard L. Carpenter et al.,* from the Supreme Court of Pennsylvania. Opinion filed May 22, 1905, and reported in vol. 1, L. R. A. New Series, p. 902.

The Trust Fund Doctrine

It is not necessary to rely upon the doctrine that the capital stock of a corporation constitutes a trust fund to which creditors may resort for the payment of debts in event of insolvency of the company in order to sustain jurisdiction in equity in this suit. The jurisdiction of the equity court here is fully sustained on the ground of fraud. It is charged in the bill that the defendants organized the corporation

without paying for the stock assigned to each, except the defendant, Krause, who paid into the treasury the sum of Two Thousand Dollars, with the distinct understanding that this amount, with interest, should be returned to him as soon as the corporation came to be a going concern, although they represented in the Articles of Incorporation that Ten Thousand Dollars had been paid into the treasury of the company (Trans., pp. 9-10). These false representations constituted a fraud against the public and every creditor of the company.

The Supreme Court of Minnesota clearly states applicable doctrine as follows:

> "By putting it on the ground of fraud," said Judge MITCHELL, "and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in-capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder: 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to en-

force so familiar a rule of equity. It is the misrepresentation of the fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases."

Hospes v. *Car Co.*, 48 Minn. 174, 50 N. W. 1117.

We respectfully suggest that the following propositions are fully sustained by the foregoing authorities, namely:

First. That there is no Federal question properly raised in the record, and that this court has no jurisdiction of the writ of error issued herein.

Second. That if the record presents for decision a Federal question, it is clear that the plaintiff in error was not denied the constitutional right of trial by jury, since he waived this right by voluntarily going to trial before the court without demanding the right.

Third. That the subject matter of the suit was properly cognizable in equity, and the suit itself was rightfully brought on the equity side of the docket.

The decision of the Supreme Court of Oklahoma is abundantly sustained by authority and reason, and the judgment appealed from should be affirmed.

FREDERIC D. MCKENNEY,
CLINTON A. GALBRAITH,
Attorneys for Defendant in Error.

rant this court in reviewing, under § 709, Rev. Stat., the judgment of the state court to which the case was transferred on Statehood.

Demurrer in the territorial court, on the ground that the action should be at law and not in equity, is not such a demand for a jury trial as to amount to specially setting up a right under the trial by jury provision of the Federal Constitution.

In order to entitle plaintiff in error to have this court review a judgment of the state court in an action transferred to that court from the territorial court after Statehood, the Federal question should be specially set up in the state court at the proper time; he cannot rely on a premature assertion of the right in the territorial court.

Writ of error to review, 27 Oklahoma, 584, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the state court under § 709, Rev. Stat., and Judicial Code, § 237, and whether a Federal question exists and was properly and specially set up in the state court, are stated in the opinion.

Mr. Frank B. Burford, with whom *Mr. John H. Burford* was on the brief, for plaintiff in error.

Mr. Frederic D. McKenney, with whom *Mr. Clinton A. Galbraith* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This writ of error brings before us a judgment of the Supreme Court of the State of Oklahoma, affirming a judgment rendered by the District Court of Okfuskee County, holding the plaintiff in error liable for the amount of an unpaid subscription made by him to the capital stock of a bank of which the defendant in error is the Receiver.

The case is brought here under § 709, Rev. Stat., Judicial Code, § 237, and the jurisdictional question is raised.

The action was commenced in the United States court

for the Western District of the Indian Territory on September 17, 1906, by Ebey, as receiver of the Citizens Bank and Trust Company, against Dill, the plaintiff in error, and four others, by the filing of a complaint in equity setting forth that the defendants had organized the Bank and caused it to be incorporated for the purpose of transacting a general banking and trust business at Stonewall, in the Indian Territory; that the articles of incorporation and certificate required by law were properly filed, setting forth the objects and purposes of the corporation, and reciting that the capital stock was $25,000, divided into shares of $25 each, and that $10,000 thereof had been actually paid in by the subscribers, who were the defendants, and that they had severally taken certain shares of stock, of which 80 shares, of the par value of $2,000 were issued to Dill; that he had not paid any part of this par value, or anything of value, for the stock subscribed for by and issued to him; that defendants organized the Bank without any purpose or intent to pay for its capital stock, except $2,000 paid in by one of the other defendants, and that this latter sum was paid in with the distinct understanding that it should be returned, and it was returned, after the corporation became a going concern; that the Bank was and is insolvent, and on the petition of one of its creditors the plaintiff was appointed by the United States court for the Southern District of the Indian Territory, Receiver to take charge of all its property and effects and administer them for the benefit of its creditors; that the liabilities as shown by its books were $15,179.02; that a great deal of its paper was worthless, and a very small sum could be realized from the same and the rest of its assets; that after six months' effort the plaintiff had only been able to collect on notes $60.50, and to realize on other property the sum of $100; that all of the capital stock represented as paid, namely, $10,000, and the assets in the hands of the plaintiff as

Receiver, would not be sufficient to pay the creditors; that on a partial presentation of these facts to the judge, an order was made directing the plaintiff as Receiver to institute proper proceedings against the defendants as subscribers to the capital stock, to recover the respective amounts remaining unpaid on said subscription, or for the stock issued to them, for the benefit of all the creditors of the bank, and that this suit was commenced in compliance with that order. "That the plaintiff has no adequate remedy at law, and unless this court takes jurisdiction of this suit in equity he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions."

November 4, 1907, Dill filed a demurrer to the complaint, upon the following grounds: (a) That it did not state sufficient facts to authorize a court of equity to assume jurisdiction; (b) That it showed upon its face that plaintiff had a plain, adequate, and complete remedy at law; and (c) That defendant was entitled to a trial by jury under the laws and Constitution of the United States, of which he would be deprived should the cause be tried in equity. The demurrer was overruled, and he took an exception.

Thereafter, and on November 16, 1907, by proclamation of the President (35 Stat. 2160), the State of Oklahoma, including the former Territory of Oklahoma and Indian Territory, was admitted into the Union by virtue of the Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335. By § 20 of this act (34 Stat. 277), as amended by act of March 4, 1907, 34 Stat. 1286, c. 2911, it was provided that all causes pending in the District Courts of Oklahoma Territory and in the United States courts in the Indian Territory at the time said Territories should become a State, not transferred to the United States Circuit or

District Courts under previous sections, should be "proceeded with, held and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States Courts in the Indian Territory; with the right to prosecute appeals or writs of error to the supreme or appellate court of said State, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such State to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a State to the Supreme Court of the United States."

Upon Statehood, the present action was transferred to the District Court of Okmulgee County, and the defendant Dill, now plaintiff in error, obtained its transfer from that court to the District Court of Okfuskee County. There he answered upon the merits, admitting the organization and incorporation of the Bank, and that he subscribed for eighty shares of its capital stock, but alleging that he paid the consideration therefor to the Bank at the time, and denying any indebtedness to the plaintiff on the stock.

If any of the other defendants pleaded to the action, the transcript presented here does not show it. The cause, however, came on for trial before the court without a jury, the plaintiff, the defendant Dill, and another defendant named Malott, appearing respectively in person and by attorney. The issue as between the plaintiff and Malott was declared to be, whether the latter had in fact subscribed for eighty shares of the stock of the Bank, for the par value of which the plaintiff sought to hold him liable. The trial court found in favor of the defendant Malott, and against the defendant Dill, and rendered a decree against the latter for $2,000, together with interest and costs.

Dill moved for a new trial on several grounds, the only one here significant being—"Error of the court in trying the said cause without submitting the same to a jury, when the parties thereto had not waived a jury trial."

This motion having been denied, he appealed to the Supreme Court of Oklahoma, renewing there the insistence that the cause of action alleged in the complaint was cognizable at law and not in equity, and that under the Constitution and laws of the United States he was entitled to a trial by jury. The court overruled this contention and on rehearing adhered to the same view, so that the judgment of the District Court was affirmed (27 Oklahoma, 584), and the case comes here.

It is insisted that whatever rights or immunities, under the laws of the United States, had been asserted by defendant in the course of the litigation prior to Statehood, were preserved to him after Statehood by the clause above quoted from § 20 of the Enabling Act, together with § 1 of the schedule to the state constitution (Okla. Comp. Laws, 1909, p. 137), the language of which is: "No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place."

Without passing upon the soundness of this proposition, we may, for present purposes, assume it to be sound. *Blanchard* v. *Ezell*, 106 Pac. Rep. 960; *Garnsey* v. *State*, 112 Pac. Rep. 24; *Pacific Mutual Life Ins. Co.* v. *Adams*, 112 Pac. Rep. 1026; *Choctaw Electric Co.* v. *Clark*, 114 Pac. Rep. 730; *St. Louis & S. F. R. Co.* v. *Cundieff*, 171 Fed. Rep. 319, 322.

Next, the insistence is that by his demurrer, filed before Statehood, and specifying, as one of the grounds, that the plaintiff had "a plain, adequate, and complete remedy at law," the defendant clearly asserted a right or immunity under § 723, Rev. Stat., which declares that—"Suits in

equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." This section, however, by its own terms applies only to "courts of the United States;" and when afterwards a United States Court was established in the Indian Territory by the act of March 1, 1889, c. 333, 25 Stat. 783, it was by the sixth section enacted—"That the provisions of chapter eighteen, title thirteen, of the Revised Statutes of the United States shall govern such court, so far as applicable; *Provided*, That the practice, pleadings, and forms of proceeding in civil causes shall conform, as near as may be, to the practice, pleadings, and forms of proceeding existing at the time in like causes in the courts of record of the State of Arkansas, any rule of court to the contrary notwithstanding." Chap. 18 of Title 13, Rev. Stat., includes some sections prescribing the forms of procedure, but not § 723. However, the proviso making the practice, pleadings, and forms of procedure conformable to those existing in the State of Arkansas must of course be given effect. Moreover, in the act of May 2, 1890, enlarging the jurisdiction of the court (c. 182, 26 Stat. 81, 95), it was in § 31 enacted that certain provisions of the Arkansas statutes, as contained in Mansfield's Digest of 1884, should be extended over and put in force in the Indian Territory, among them being chapter 119, relating to pleadings and practice. That chapter (Mans. Dig., §§ 4914, etc.) abolishes forms of action; provides that there shall be but one form of civil action; enacts that the proceedings therein may be of two kinds, at law or in equity: (§ 4925), that "An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket;" and (§ 4926), that such error may be corrected on motion. Section 5028 provides that the

DILL *v.* EBEY, RECEIVER OF THE CITIZENS' BANK AND TRUST COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 191. Argued March 17, 1913.—Decided May 26, 1913.

Section 723, Rev. Stat., declaring that suits in equity shall not be sustained where a plain, adequate and complete remedy may be had at law, by its own terms applies only to courts of the United States; and does not apply to a territorial court, the procedure of which has been prescribed according to the law of an adjoining State, and to c. 18, Rev. Stat., which does not include § 723.

Even if a demurrer in an action in the United States Court of Indian Territory, on the ground that the action should be at law instead of in equity, does amount to an assertion of right under § 723, Rev. Stat., that section is so plainly inapplicable to the practice in such court that no substantial Federal question is raised that would war-

defendant may demur to the complaint for want of jurisdiction of the court over the person or the subject-matter, the plaintiff's want of legal capacity, the pendency of another action, a defect of parties, plaintiff or defendant, or "*Fifth*, That the complaint does not state facts sufficient to constitute a cause of action." Evidently, under this mode of pleading, the objection that the action is in equity, whereas it ought to be in law, is not a ground of demurrer. The liberality of the system is illustrated in *Zufall* v. *United States*, 1 Ind. Terr. 638, 643; *Sparks* v. *Childers*, 2 Ind. Terr. 187, 198; *Hampton* v. *Mayes*, 3 Ind. Terr. 65, 72; *Rogers* v. *Nidiffer*, 5 Ind. Terr. 55, 58. In *Indian Land & Trust Co.* v. *Shoenfelt*, 135 Fed. Rep. 484, the Circuit Court of Appeals for the Eighth Circuit, in an action commenced by bill in equity in the United States Court in the Indian Territory, seems to have held that § 723, Rev. Stat., was applicable. But see a later decision by the same court in *St. Louis & S. F. R. Co.* v. *Cundieff*, 171 Fed. Rep. 319, 321.

Upon this question, we hold that if the demurrer may be deemed an assertion by the defendant of a right, under § 723, Rev. Stat., to have the case determined in equity, yet that section was so plainly inapplicable to the practice in the territorial court that no substantial Federal question is raised, such as would warrant a review here under § 709, Rev. Stat.

It is, however, next insisted that the demurrer amounted also to a demand for a trial by jury, and an assertion of a right thereto under the Federal Constitution (extended to the Territory by c. 182, § 31, 26 Stat. 96); and that this right was denied by the subsequent decision of the state court sustaining the judgment notwithstanding the demurrer.

We deem this untenable, for two reasons, viz., (a) because the demurrer was not a proper demand for trial by jury; and (b) the right to such a trial, if it existed, and

was properly demanded prior to Statehood, was subsequently waived.

(a) We have already pointed out that under the Code as contained in Mansfield's Digest the grounds of demurrer are limited, and the contention that defendant will be deprived of a jury trial is not one of them. Indeed, since a demurrer has the necessary effect of admitting the facts alleged in the complaint, a demand for a trial by jury is quite incongruous; for a jury has no function to perform where the facts are admitted. It is evident that, under the local practice, the court of the Territory was warranted in overruling this ground of demurrer, and that no question of Federal right is raised by its action in doing so.

(b) As already pointed out, the defendant afterwards answered in the state court, denying the facts set up in the complaint. But he did not in his answer, nor at any other time so far as the record discloses, demand a jury trial until after the court had found against him on the facts and rendered judgment accordingly. He did then move for a new trial upon the ground, among others, that there was error in trying the cause without submitting it to the jury, "when the parties thereto had not waived a jury trial."

While it is conceded that under Mansfield's Digest, § 5105, and also under § 5785 of the State Code (Comp. Laws Okla. 1909, p. 1256), a jury might be waived, it is insisted that since the case was tried after Statehood, and pursuant to the procedure prescribed by the state law, § 5808 (Okla. Comp. Laws 1909, p. 1258) applied, which prescribes the manner in which trial by jury may be waived, viz., "By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal."

The record shows no written consent, nor any entry upon the journal of oral consent. It does show that the action was in form an action in equity, normally triable without jury, and it further shows a trial of the issues before the court without a jury, in which trial the now plaintiff in error participated in person and by attorney, without taking any exception to the mode of trial.

The state courts did not pass upon the question whether under the local practice this amounted to a waiver of a demand for jury trial; both courts having entertained the view that the cause was properly brought in equity, in which case there was no right to trial by jury.

We deem it clear that in order to entitle himself to a review here under § 709, Rev. Stat., on the ground of a deprivation of the right to trial by jury, plaintiff in error should have "specially set up" his alleged right in proper time in the state court, and should not have relied upon a premature assertion of that right, contained in a demurrer where it had no proper place, and not reiterated at any time when there was an issue of fact to be tried.

Writ of error dismissed.